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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of LEVEL 3 COMMUNICATIONS, LLC (U-5941-C) for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and Applicable State Laws for Rates, Terms and Conditions of Interconnection with SBC Bell Telephone Company dba SBC California and SBC Communications.	Application 04-06-004 (Filed June 1, 2004)

FINAL ARBITRATOR'S REPORT

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FINAL ARBITRATOR'S REPORT

I. Background

Level 3 Communications, LLC (Level 3) and Pacific Bell Telephone Company (SBC) exchange telecommunications traffic pursuant to an existing interconnection agreement. Level 3 and SBC disagree as to the date that negotiations for a successor agreement began, but they stipulated that the arbitration window under Section 252(b)(1)[1] closed on June 1, 2004. Level 3 filed this application on that date, seeking arbitration of the entirety of the agreement.

On June 25, 2005, the parties entered into an agreement to suspend the arbitration proceedings for approximately one month so that they could attempt to resolve some of the issues in dispute. On June 28, 2004, SBC filed its response to the petition, identifying 317 issues for arbitration.[2]

On August 16, 2004, the parties filed a partial Joint Matrix of Disputed Issues identifying 55 issues for arbitration. On August 30, 2004, the parties filed a supplemental Joint Matrix of Disputed Issues identifying an additional 43 issues for arbitration. Over a third of the identified disputed issues contain multiple sub-parts. In addition, the parties presented dueling issue statements on 61 of the 98 issues identified.

On September 2, 2004, Level 3 filed testimony in substitution for its original testimony of June 1, 2004. SBC filed responsive testimony on September 20, 2004.

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[1] All references to Sections 251 and 252 are to the 1996 Telecommunications Act.

[2] Pursuant to the parties' suspension agreement, the Chief Administrative Law Judge excused SBC California from filing testimony at that time.

Arbitration hearings were held on October 25 through October 28, 2004. At the October 25 hearing, parties informed the arbitrator they had reached a preliminary resolution of three additional issues. On November 12, parties filed and served a joint revised statement of disputed issues identifying the impact of the three resolved issues on the remaining unresolved issues. On November 12, 2004, the parties filed a further revised matrix of disputed issues indicating that they had resolved nine additional issues. On December 15, 2004, the parties submitted a joint stipulation resolving an additional disputed issue. At that time, 84 issues remained for arbitration.

At the October 28 hearing, the parties agreed to extend the final date for the Commission decision in this proceeding to March 17, 2005, and to the following schedule. The Draft Arbitrator's Report was filed and served on December 22, 2004. Parties filed and served comments on the Draft Arbitrator's Report on January 11, 2005. Parties filed and served reply comments on January 18, 2005. The arbitrator reviewed the comments and took them into account, as appropriate, in finalizing this Report. The Final Arbitrator's Report was filed and served on February 8, 2005. On February 15, 2005, the parties will file an entire interconnection agreement that conforms to the decisions of the Final Arbitrator's Report, with a statement of whether the Commission should adopt or reject the agreement.

II. Summary

This report addresses and resolves the most significant issues in this arbitration as follows:

(i) What intercarrier compensation applies to Internet protocol (IP) enabled services traffic between the Internet and the Public Switched Telephone Network (PSTN)?

The Federal Communications Commission (FCC) has recently determined that IP-enabled services traffic is jurisdictionally exclusively interstate for purposes of regulating the terms and conditions for the exchange of such traffic.[3] This Commission nevertheless has the authority and duty to ensure that the parties' interconnection agreement is consistent with the requirements of federal law. Although the issue is currently pending before the FCC,[4] at present access charges do not apply to IP-enabled services traffic. Absent a change in law that imposes a different intercarrier compensation regime on IP-enabled services traffic, the parties are directed to exchange such traffic subject to reciprocal compensation.

(ii) What intercarrier compensation applies to ISP-bound traffic between originating parties and ISPs that have a virtual, but not geographic, presence in the same local exchange as the originating parties?

Pursuant to the FCC's *ISP Remand Order*,[5] Internet Service Provider (ISP)-bound traffic is subject to a fixed rate of $0.0007 per minute of use. This rate applies only to ISP-bound traffic to ISPs that have a geographic presence in the same local exchange as the originating parties. It does not apply to interexchange or FX (foreign exchange) ISP-bound traffic.

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[3] *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* WC Docket No. 03 211 (rel. Nov. 9, 2004) (*Vonage Order*).

[4] *In re IP-Enabled Services*, WC Docket No. 04-36 (rel. March 10, 2004) (*IP-Enabled Services NPRM*).

[5] Order on Remand and Report and Order, *In re Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151 (2001) (*ISP Remand Order*).

(iii) Should traffic be combined on local interconnection trunks or should separate trunk groups be maintained to carry discrete types of traffic?

Local trunk groups may carry local, ISP-bound and IP-enabled traffic. Separate trunk groups shall be maintained to carry interexchange traffic, to the extent that Level 3 intends to transport such traffic.

(iv) Is transit traffic, e.g., traffic that is originated or terminated by a third party local service provider, subject to arbitration under Sections 251 and 252?

Transit traffic is subject to arbitration under Sections 251 and 252 and shall be provided for in this agreement.

(v) Should this agreement adopt the Unbundled Network Elements (UNE) provisions of the prior interconnection agreement, or eliminate certain elements and / or adopt new provisions for other elements, pending the FCC issuance of final unbundling rules?

Level 3 is not entitled to the rates, terms and conditions for declassified unbundled network elements contained in the parties' current interconnection agreement. Pursuant to *USTA II*[6] and the FCC's *Interim Order*,[7] SBC is not required to provide unbundled access to declassified unbundled network elements.

III. Intercarrier Compensation

A. IP-Enabled Services Traffic

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[6] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), cert. denied, 125 S.Ct. 313, 316, 345 (2004).

[7] *Unbundled Access to Network Elements Order and Notice of Proposed Rulemaking*, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Aug. 20, 2004) (*Interim Order*).

The most significant issues in this arbitration concern what intercarrier compensation and network interconnection method apply to IP-enabled services traffic between the Internet and the PSTN. The IP-enabled services traffic at issue in this arbitration is communications traffic that undergoes a net protocol conversion from IP format to the data format used by the PSTN,[8] or vice versa (IP-to-PSTN or PSTN-to-IP).

Level 3 provides net protocol conversion services to Internet service providers on a wholesale basis. Specifically, Level 3 provides phone numbers to Internet service providers, who then assign them to their retail customers. For calls originating on the Internet (IP-to-PSTN), the communication is routed through Level 3's network to the closest point associated with the called party's phone number, at which point Level 3 converts the communication to PSTN format for transmission to the local exchange carrier serving the called party. For calls originating on the PSTN (PSTN-to-IP), after Level 3 receives the communication from the local exchange carrier serving the calling party, Level 3 converts the communication to IP format for routing anywhere over the IP network to the Internet service provider's retail customer. Thus, although the phone numbers on either end of the communication may be in the same LATA, the parties to the communication may be physically located in separate, geographically remote locations.

The issue of what intercarrier compensation should apply to IP-enabled voice services traffic is currently before the FCC, particularly in the *IP-Enabled Services NPRM*. Once the FCC renders its decisions in these dockets, the parties

[8] Time division multiplexing, or TDM.

may need to adopt new contract language to conform to them (using the change of law process). Meanwhile, however, the Commission has the authority and the duty to ensure that the parties' interconnection agreement is consistent with the requirements of federal law.

Level 3 and SBC agree that this Commission should not anticipate what regulatory framework will emerge from the FCC's inquiry, but instead should simply apply the currently applicable intercarrier compensation regime to the exchange of such traffic. Level 3 and SBC fundamentally disagree on what the currently applicable intercarrier compensation regime is.

Level 3 argues that currently there is no intercarrier compensation plan applicable to IP-enabled traffic and proposes therefore that the Commission refrain from adopting any compensation rate for IP-enabled traffic in this proceeding. SBC, on the other hand, argues that current intercarrier compensation rules require the assessment of access charges on IP-enabled traffic between originating and terminating end users that are geographically located in different exchanges.

Contrary to SBC's position, IP-enabled services traffic is not currently subject to access charges. As the Commission notes in its order instituting its investigation into the regulatory framework to apply to voice over Internet protocol (VoIP), VoIP providers do not contribute to the payment of access charges under the current regulatory access charge scheme.[9] This observation echoes the FCC's acknowledgement that currently IP telephony "is exempt from

[9] *Order Instituting Investigation re Voice over Internet Protocol*, I.04-02-07, p. 7.

the access charges that traditional long-distance carriers must pay."[10] It is against this backdrop that the FCC is undertaking to explore "the extent – if any – that application of a particular regulatory requirement [to IP-enabled services] is needed to further critical national policy goals."[11]

That inquiry will take into account many of the arguments made by Level 3 and SBC in this arbitration. It may be that the FCC will ultimately determine that IP-enabled services traffic will be subject to access charges due to its similarity to interexchange traffic. However, it is inappropriate for this Commission to resolve this issue on the basis of a prediction, in the face of both commissions' statements that access charges do not currently apply, the FCC's very recent assertion of exclusive economic jurisdiction over certain IP-enabled services,[12] the FCC's steadfast and emphatic refusal to prejudge the applicability of access charges to IP-enabled services traffic,[13] and the FCC's pending determination on the issue in the *IP-Enabled Services NPRM*.

SBC argues federal law is clear that IP-enabled services traffic that originates and terminates in different local exchanges is interexchange traffic and thus subject to the same access charge requirements that apply to all other interexchange traffic. SBC points to the language of 47 C.F.R. § 69.5, which

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[10] *IP-Enabled Services NPRM,* ¶ 30, citing to *Intercarrier Compensation NPRM*, CC Docket No. 01-92 (released April 27, 2001), ¶ 133.

[11] *Id.*, ¶35.

[12] *Vonage Order.*

[13] See, e.g., *Vonage Order*, ¶ 14, fn. 46; Order, *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, 19 FCC Rcd 7457 (2004) (*AT&T Declaratory Order),* ¶¶ 2, 10, 13.

imposes access charges on "interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." SBC's argument begs rather than resolves the applicability of 47 C.F.R. § 69.5: Is IP-enabled service interexchange service? This issue is before the FCC. For now, according to the FCC, such service is not considered to be interexchange service subject to access charges.

SBC argues that IP-to-PSTN and PSTN-to-IP traffic must be characterized as interexchange (e.g., long distance) traffic as a matter of law when the originating end-user and terminating end-user are physically located in geographically different local exchanges. However, the FCC has recently declined to characterize IP-enabled services traffic on a geographic basis:

> Indeed, it is the total lack of dependence on *any* geographically defined location that most distinguishes [IP-enabled services traffic] from other services whose federal or state jurisdiction is determined based on the geographic end points of the communications. (*Vonage Order,* ¶ 25, emphasis in original.)

The FCC concluded that the concepts of "local" and "long distance" do not apply to IP-enabled services traffic in the way that they do for traditional wireline telephone services. (*Id.*, ¶ 27.) It is therefore inappropriate to determine in this forum that the geographical locations of the originating and terminating end-users are determinative of the applicable compensation scheme.

SBC points to the FCC's policy statement that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne

equitably among those that use it in similar ways." The Commission supports this policy and has urged the FCC to adopt it going forward.[14] However, as SBC admonishes, it is not the Commission's place, in this arbitration, to resolve the issue before us on policy grounds.

SBC contends that the FCC's *AT&T Declaratory Ruling* confirms the application of access charges to interexchange traffic to or from the PSTN, regardless of the technology used. However, although the FCC's policy rationale may ultimately apply to the IP-enabled services at issue in this arbitration, the FCC explicitly limits the applicability of the *AT&T Declaratory Ruling* to AT&T's specific PSTN-IP-PSTN service. (*Id.*, ¶¶ 2, 10, 13, 15, 19.)

On its part, Level 3 appears to argue that IP-enabled services traffic is not subject to access charges on two alternative bases. On the one hand, Level 3 appears to argue that IP-enabled services traffic falls under the enhanced service provider (ESP) exemption. The ESP exemption exempts enhanced service providers and their successors, ISPs, from carrier access charges; instead, ESPs and ISPs pay end user charges. Level 3 appears to analogize its function as a net protocol converter of telecommunications traffic to that of an ISP for purposes of the ESP exemption. This analogy fails, however. Unlike an ISP, Level 3 is not the end-user of the communication; unlike ISP-bound traffic, IP-enabled traffic is not between the service provider and its own end user customers.

Level 3 suggests that IP-enabled services traffic is nevertheless exempt from access charges pursuant to the policy underlying the ESP exemption and

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[14] Comments of the People of the State of California and the California Public Utilities Commission, May 28, 2004, *In the Matter of IP-Enabled Services*, WC Docket 04-36, p. 39, citing to *IP-Enabled Services NPRM*, ¶61.

the FCC's arguable bent, as Level 3 assesses it, toward extending the exemption to IP-enabled services traffic. Level 3 also points to SBC's comments to the FCC in the *IP-Enabled Services NPRM* that somewhat endorse Level 3's policy position. As the parties have admonished, however, policy arguments and predictions do not govern the Commission's resolution of this dispute.

Alternatively, Level 3 argues that IP-enabled services traffic is subject to Section 251(b)(5)'s reciprocal compensation regime, and has not been "carved out" from that regime under Section 251(g). I concur. Section 251(b)(5) refers to the obligation of local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of "telecommunications." Section 251(b)(5) is limited by Section 251(g), which "carves out" certain types of telecommunications, e.g., "exchange access, information access, and exchange services for such access to interexchange carriers and information service providers." The provision of IP-enabled services is not information service as it is not an end-use function and, at least under the FCC's current interpretation, it is not exchange service for access to interexchange carriers as discussed above. Having not been carved out from the reciprocal compensation regime of Section 251(b)(5), IP-enabled services traffic is subject to it.

Although I adopt the position that access charges do not currently apply to Level 3's IP-enabled services traffic, I reject much of Level 3's proposed language as unnecessary and improper for inclusion in a contract. In addition, I modify Level 3's proposed definition of "IP-enabled services" to capture the type of IP-enabled services at issue in this arbitration, namely the net conversion between IP and Time Division Multiplexing format for communication between end users of the Internet and the PSTN.

In its comments on the Draft Arbitrator's Report, SBC proposes for the first time that Level 3 be required to track the volume of IP-PSTN traffic it delivers to SBC, and to establish and pay into an escrow the amount of access charges it would owe if access charges applied to that traffic, for retroactive reimbursement to SBC in the event that the FCC determines that something other than reciprocal compensation will apply to IP-PSTN traffic. SBC's proposal is untimely and unduly prejudicial to Level 3, who would be denied the opportunity to address this proposal in testimony, hearings and briefs.

Accordingly, I adopt reciprocal compensation for the exchange of Level 3's IP-enabled traffic pursuant to Section 251(b)(5), and resolve the disputed language related to IC-2[15] as follows:

- Level 3's proposed § 3.2 is adopted. This language presents the heading "*IP-Enabled Services Traffic*."
- Level 3's proposed § 3.2.1 is adopted. This language presents the heading "*Definition of IP-enabled Services*."
- Level 3's proposed § 3.2.1.1 is rejected, and shall be replaced with the following language: *"IP-enabled services" are services and applications that entail net protocol conversion from IP to TDM or vice versa to permit connection between end users of the Internet and the PSTN."*

[15] Issue numbers refer to their designation in the parties' joint Disputed Points List (DPL). The acronyms refer to the respective appendices, i.e., Intercarrier Compensation (IC), Interconnection Trucking Requirements (ITR), Network Interconnection Method (NIM), Physical Collocation (PC), Virtual Collocation (VC), Unbundled Network Elements (UNE), Coordinated Hot Cuts (CHC), Recording (REC), Signaling System 7 (SS7), Out of Exchange Traffic (OET), General Terms and Conditions (GT&C) and Definitions (DEF).

- Level 3's proposed § 3.2.1.1.1 is rejected. This language conditions the subsequent definitions on a judgment regarding the non-geographic nature of IP-enabled services. This language is unnecessary to effect the purpose of this contract, and it is improper to require parties to contractually agree to a policy, factual or legal statement, especially one with which they may disagree.

- Level 3's proposed § 3.2.1.1.1.1 is adopted. This language reasonably clarifies that VoIP is included in the definition of IP-enabled services traffic.

- Level 3's proposed § 3.2.1.2 is rejected. This language presents a legal conclusion regarding jurisdiction over IP-enabled services. This language is unnecessary to effect the purpose of the contract, and it is improper and unnecessary to require parties to contractually agree to a policy, factual or legal statement.

- Level 3's proposed § 3.2.1.3 is rejected. This language presents a description of the requirements of Level 3's net protocol conversion service. This language is unnecessary to effect the purpose of the contract, and it is improper to require parties to contractually agree to what services Level 3 provides to its customers.

- Level 3's proposed § 3.2.2 is adopted. This language presents the heading "*Identification of IP-enabled Services Exchanged Between the Parties.*"

- Level 3's proposed § 3.2.2.1 is rejected. This language requires both parties to agree that it is not possible to identify the physical location of their customers. This language is unnecessary to effect the purpose of the contract, and it is improper to require parties to contractually agree to a policy, factual or legal statement, especially one with which they may disagree.

- Level 3's proposed § 3.2.2.2 is rejected. Similar to Level 3's proposed IC § 3.2.1.3, this language describes Level 3's net

protocol conversion service to its customers, here in terms of the desires of Level 3's customers.

- Level 3's proposed § 3.2.2.3 addresses Signaling System 7 (SS7) call setup, and is addressed at Section III.E.4.

- Level 3's proposed §§ 3.2.2.4 through 3.2.2.5 addresses a percentage approach to identify traffic volumes subject to different compensation, and are addressed at Section IV.A.

- Level 3's proposed §§ 3.2.3 through 3.2.3.1 are rejected. There is no need for a separate provision for "*Compensation for IP-enabled Services Traffic,*" because Section 251(b)(5) traffic is to be defined to include IP-enabled traffic (see discussion of DEF-18, at Section XIII.L). With that definition, IP-enabled services traffic is therefore subject to the Section 251(b)(5) traffic compensation provisions of § 6.

- Level 3's proposed §§ 3.3 through 3.3.3 defines ISP-bound traffic. They are rejected, as the term is defined in the Definitions Appendix, as discussed at Section XIII.H regarding DEF-8.

- Level 3's proposed §§ 3.4 through 3.4.5 are rejected. This language defines "*circuit-switched traffic,*" contrasting it with features of IP-enabled services traffic that parties argue do or do not justify the imposition of different regulatory charges. This language is unnecessary to effect the purpose of the contract, and it is improper to require parties to contractually agree to a policy, factual or legal statement, especially one with which they may disagree. See discussion on IC-1 at Section III.D, and also discussion on DEF-3 at Section XIII.D.

- SBC's proposed § 16 is adopted, except that the phrase beginning "*including, without limitation, any traffic that…*" through but not including the phrase "*provided, however, the following categories…*"is deleted, and the phrase, "*provided, however, that Switched Access Traffic does not include IP-enabled services traffic*" is added in its stead.

B. ISP-Bound Traffic

1. When the ISP is Located in the Local Exchange in which the Call Originated

Level 3 and SBC appear to agree that the *ISP Remand Order's* compensation plan's fixed rate of $0.0007 per minute of use applies to ISP-bound traffic when the ISP is located in the same local exchange in which the call originated. I adopt the FCC's fixed rate of $0.0007 per minute of use pursuant to the *ISP Remand Order.*

Level 3 opposes SBC's proposed terms and conditions to the extent they provide for "bill and keep" arrangements for new markets and for traffic that exceeds growth caps. During the negotiations, these terms were at issue before the FCC. The FCC's recently issued *Core Forbearance Order*[16] on ISP-bound compensation revokes its prior decision allowing such arrangements.

SBC agrees that the *Core Forbearance Order* precludes application of the *ISP Remand Order*'s growth caps for compensable ISP-bound traffic and its "new markets" rule, and withdraws its proposed language reflecting those terms.

Level 3 articulates no other objection to SBC's proposed contract language to the extent that it invokes the *ISP Remand Order.* With the withdrawal of the proposed language regarding growth caps and the "new markets" rule, SBC's proposed language fairly reflects the FCC's compensation plan for ISP-bound traffic. Accordingly, I dispose of the disputed contract language concerning compensation for ISP-bound traffic (IC-5 and IC-13) as follows:

- IC -5: SBC's proposed § 3.3 is adopted, and Level 3's is rejected, as SBC's properly implements the FCC's *ISP Remand*

[16] Order, *Petition of Core Communications, Inc. for Forbearance*, WC Docket No. 03-171, 2004 WL 2341235 (rel. Oct. 18, 2004) (*Core Forbearance Order).*

Order with respect to the rate applied to the exchange of ISP-bound traffic. (The issue of limiting this provision to local ISP-bound traffic is addressed below at Section III.B.2.)

- IC-13: SBC's proposed §§ 6 through 6.6.1 are adopted, except that §§ 6.4 and 6.5 regarding growth caps and new market restrictions are deleted.

2. When the ISP is Located in a Different Local Calling Area from which the Call Originated

Level 3 maintains that the FCC's fixed rate of $0.0007 applies to all ISP-bound traffic, regardless of whether the call to the ISP is local or interexchange. SBC maintains that the FCC's fixed rate applies only to local calls to ISPs, and that access charges apply to ISP-bound calls where the call terminates in a different local calling area.

I adopt SBC's proposal with the qualification that it applies specifically to calls outside the local calling area. Access charges properly apply to ISP-bound calls where the call is outside the local calling area.

In contrast, the *ISP Remand Order* concerned ISP-bound traffic within a local exchange area. The inquiry arose with respect to "whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP *in the same local calling area* that is served by a competing LEC." (*ISP Remand Order,* ¶ 13.) The FCC addressed the concern that in most states, "reciprocal compensation governs the exchange of ISP-bound traffic between local carriers," leading to inaccurate price signals and subsidies to end users and ISP customers. (*Id.,* ¶ 68.) The FCC undertook to correct these market distortions by moving toward bill and keep by implementing an interim regime of decreasing compensation rates capped at $0.0007 per minute of use. (*Id.,* ¶ 77-78.) No such market distortions exist with respect to ISP-bound traffic

outside the local calling area that is properly assessed access charges. Indeed, as SBC notes, the FCC described its *ISP Remand Order* compensation plan as "an exception to the reciprocal compensation requirements of the Act for calls made to ISPs *located within the caller's local calling area*." (*Core Forbearance Order,* n.25, emphasis added.)

Level 3 contends that the FCC rejected any geographic limitation of its compensation plan, noting the FCC's statement that the definition of "information access" "does not further require that the transmission, *once handed over to the information service provider*, terminate within the same exchange area in which the information service provider first received the access traffic." (*ISP Remand Order,* fn. 82, emphasis added.) However, this statement leads to the opposite conclusion that the transmission at issue is local as between the caller and the ISP; the FCC merely observes that the geographic destination *after* it reaches the ISP is irrelevant to a determination of whether the transmission is "information access" or not.

Accordingly, I dispose of the disputed contract language concerning compensation for interexchange ISP-bound traffic (IC-5 and IC-15) as follows:

- IC-5: SBC's proposed § 3.3 is adopted, and Level 3's is rejected, as SBC's language appropriately defines "*ISP-bound traffic*" for the purposes of the $0.0007 compensation rate for such traffic within the same local exchange.

- IC-15: SBC's proposed §§ 7.4 and 7.5 are adopted, as it clarifies that ISP-bound traffic that is traded outside the local calling areas are not subject to the $0.0007 compensation rate, and defines the appropriate rate categories for such traffic.

3. When the Call is FX or to a Virtual Number Identified with the Local Calling Area in which the Call Originated

FX, or virtual NXX (VNXX), service allows a customer physically located in one local calling area to have a telephone number that is associated with a different local calling area. Thus callers to the FX service customer avoid long distance charges, even though the call originates and terminates in different local calling areas.

Level 3 maintains that the FCC's fixed rate of $0.0007 applies to all ISP-bound traffic, including FX calls to ISPs. For the reasons discussed at Section III.B.2, above, and below at Section III.C, I reject Level 3's proposal to apply the FCC's fixed rate of $0.0007 to FX calls to ISPs. ISP-bound FX calls shall be compensated in the same manner as other FX calls.

C. FX Traffic

Level 3 proposes to treat FX[17] calls as local for intercarrier compensation purposes. SBC maintains that FX calls are not subject to reciprocal compensation under Section 251(b)(5), even if the NPA-NXXs of the FX call make the call look local. SBC proposes that all FX traffic be subject to bill-and-keep, i.e., that the parties exchange no compensation for the termination of such traffic. As a fall-back position, SBC proposes to allow reciprocal compensation conditioned on requiring Level 3 to pay SBC additional "call origination charges" in compensation for SBC bringing the FX call to the point of interconnection in a different local calling area, as the Commission ordered in the Pacific Bell / Pac-West Telecomm, Inc. arbitration.[18]

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[17] The term "FX" here refers generically to what is also referred to as "FX," "virtual NXX," "FX-type," and "virtual FX" traffic. See discussion at Part XIII.N, below.

[18] *Application of Pacific Bell Telephone Company for Arbitration with Pac-West Telecomm, Inc. (*A.02-03-059) D.03-12-020 and D.03-05-031.

I reject Level 3's proposal to treat FX calls as local for intercarrier compensation purposes. SBC shall pay reciprocal compensation for Level 3's FX calls, provided that Level 3 pays SBC additional compensation for call origination consistent with the Commission's decisions in D.03-12-020 and D.03-05-031.

Level 3 contends that the Commission has previously determined that VNXX traffic, including ISP-bound VNXX traffic, is subject to reciprocal compensation. For this proposition, Level 3 cites generally to the Commission's decisions D.98-10-057 and D.99-07-047, both issued in its *Rulemaking and Investigation into Competition for Local Exchange Service* (R.95-04-043 and I.95-04-044, filed April 26, 1995).[19] However, these decisions do not address the issue before us here. Rather, the focus of both these decisions is whether reciprocal compensation applies to local calls to ISPs; the Commission found "no legal reason for treating calls to ISPs differently than other local calls." (D.99-07-047, mimeo at 11.) Level 3 also cites to D.02-06-076 for its proposition that a call is deemed local based on the rating points of the calling and called phone numbers. However, D.02-06-076 focused on whether the termination point, for purposes of determining whether a call is local or toll, is the point of interconnection or the rating point of the called party; it is not dispositive of the issue before us here.

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[19] Presumably by mistake, Level 3 also cites to Decision 99-09-002 in R.97-04-011 / I.97-04-012, the Commission's Rulemaking and Investigation to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates.

Level 3's citations to FCC decisions are likewise not dispositive. Level 3 cites to *In re Starpower Commissions, LLC v. Verizon South*[20] for the proposition that the FCC has confirmed that reciprocal compensation applies to ISP-bound FX or VNXX traffic. That case and order, however, concerned what compensation was due under the terms of the carriers' interconnection agreement; the FCC explicitly stated that it did not address the legal question of whether Sections 251 and 252 apply to VNXX traffic. (*Id.*, ¶¶ 1, 13, 17.) Level 3 cites to the *Virginia Arbitration Order*[21] for the proposition that the FCC has held that traffic, including FX or VNXX calls, shall be rated by comparing the originating and terminating NPA-NXX codes. In reaching this conclusion, however, the decision specifically notes the difference between FX service in which the subscriber obtains a dedicated private line from the subscriber to the end office switch in the desired distant rate center, versus the petitioner's FX service that did not require a dedicated private line in order to give the subscriber an NPA-NXX in the desired rate center. (*Id.*, ¶ 287.) The decision found that, under the latter arrangement, rating calls by their geographical starting and ending points was unworkable. (*Id.*, ¶¶ 288, 301.) Level 3's FX service, however, involves a dedicated FX line paid for separately by the FX subscriber; under these circumstances it is reasonable to expect that Level 3 can determine the geographic termination of its FX service line.

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[20] *In re Starpower Commissions, LLC v. Verizon South*, 04-102, EB-00-MD-19 (rel. Nov. 7, 2003).

[21] *In the Matter of Petition of WorldCom, Inc.*, CC Docket Nos. 00-218, -249, -251, Memorandum Opinion and Order, 18 FCC Rcd. 17,7222, DA 03-2738 (rel. July 17, 2002) (*Virginia Arbitration Order).*

Furthermore, this Commission disposed of this issue in its decisions on the Global NAPs, Inc. and Pac-West Telecomm, Inc. arbitrations.[22] There, the Commission concluded that VNXX traffic is interexchange traffic not subject to the FCC's reciprocal compensation rules. Although the Commission allowed the calls to be treated as local for the purposes of assessing reciprocal compensation, the Commission ordered the competitive local exchange carrier to pay the additional transport required to get those calls to where they will be considered local calls. I adopt that arrangement here.

In its opening brief, Level 3 contends that the issue of compensation for the transport of FX traffic is not in dispute because both parties have agreed to transport all of their originating traffic to the point of interconnection, and Level 3 has agreed to establish points of interconnection at any tandem at which traffic reaches 24 DS1.[23] It may be that the parties' agreement on the establishment of points of interconnection renders this transport compensation requirement moot. The parties are nevertheless directed to provide for the contingency that it is not moot.

On its part, although SBC supports the *GNAPs* and *Pac-West* arrangement as a second-best alternative, it asks the Commission to apply bill-and-keep to FX traffic that travels beyond the local exchange. In support of this request, SBC points to the FCC's *ISP Remand Order* in which the FCC stated its interest in

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[22] *In the Matter of Global NAPs Inc. Petition for Arbitration of an Interconnection Agreement, Opinion Adopting FAR with Modification* (*GNAPs* Decision), D.02-06-076; *In the Matter of Application of Pacific Bell Telephone Company for Arbitration with Pac-West Telecomm, Inc.* (*Pac-West* Decision), D.03-05-031, and *Order Denying Rehearing of Decision 03-05-031*, D.03-12-020.

[23] SBC does not respond to Level 3's discussion on this point.

moving toward a bill-and-keep regime for one-directional, ISP-bound traffic in order to eliminate the market distortions caused by applying reciprocal compensation to ISP-bound traffic.

This is not cause to veer from this Commission's disposition of the issue. The Commission had the benefit of the *ISP Remand Order* when it adopted the *GNAPs* and *Pac-West* Decisions. In addition, the Commission's determination that the FCC's reciprocal compensation rule does not apply to FX calls to ISPs is entirely consistent with the FCC. Accordingly, I dispose of the disputed contract language concerning compensation for FX and FX-like traffic, including ISP-bound FX traffic (IC-11) as follows:

- SBC's proposed § 7.2 is adopted in part, to the extent that it defines and distinguishes FX traffic from local traffic subject to Section 251(b)(5). The language proposing bill-and-keep as the compensation mechanism is rejected. The parties are directed to provide language for compensation of FX traffic consistent with the *GNAPs* and *Pac-West* Decisions as discussed above.

- The parties' disputed proposed language in §§ 8.1 through 8.3 is rejected. This language concerns Optional Calling Area traffic, and is inapplicable to California.

D. Reciprocal Compensation Terms and Conditions

This dispute generally concerns (1) the definition and identification of traffic that is subject to reciprocal compensation, and (2) the inclusion of bifurcated rates for the termination of Section 251(b)(5) and ISP-bound traffic.

SBC proposes defining the traffic that is subject to reciprocal compensation as "Section 251(b)(5) Traffic," and describes "Section 251(b)(5) Traffic" on a geographical basis so as to exclude IP-enabled services traffic and FX or VNXX traffic. Level 3 proposes instead to define the traffic subject to reciprocal

compensation as "Telecommunications Traffic," and apply reciprocal compensation to traffic that is rated as local based on NPA-NXX codes.

Consistent with the determinations made above, and as discussed fully at Section XIII.L, I adopt SBC's definition of "Section 251(b)(5) Traffic," subject to modification to clarify that it includes IP-enabled services traffic. However, that definition is included in the Definitions Appendix, and need not be repeated here in the Intercarrier Compensation Appendix.

Having defined "Section 251(b)(5) Traffic" to clarify that reciprocal compensation applies to IP-enabled services traffic but not to FX or VNXX traffic, the next question is, what is the reciprocal compensation plan? Under the FCC's interim compensation plan ordered in the *ISP Remand Order*, if SBC opts into the interim compensation plan, it must offer to exchange Section 251(b)(5) traffic at the same FCC-adopted rate for ISP-bound traffic, i.e., $0.0007 per minute of use.

SBC proposes language indicating that it has offered to exchange Section 251(b)(5) traffic at the ISP-bound traffic rate in California. SBC's proposed language also presents an alternate, bifurcated rate structure in the event that Level 3 does not accept SBC's "mirroring offer," that separates the costs of setting up the call from the costs of keeping the switch port open during the call.

Level 3 objects to SBC's bifurcated rate proposal on the basis that it is inapplicable to ISP-bound traffic under the *ISP Remand Order*. Level 3's objection is not, apparently, with respect to its agreement with SBC in California. First of all, the proposed language to which Level 3 objects applies by its terms to those states in which SBC has not yet offered to exchange traffic under the FCC's interim ISP terminating compensation plan, and explicitly provides that SBC *has* made such offer in California. Second, SBC's proposed language setting out the

rates, terms and conditions for the exchange of ISP-bound traffic and Section 251(b)(5) traffic directly tracks the FCC's interim plan and provides that ISP-bound traffic is due reciprocal compensation of $0.0007. Thus, to the extent that Level 3 has any objection to SBC's proposed rates, terms and conditions for the exchange of ISP-bound traffic, that objection appears to be irrelevant to California.

Accordingly, I dispose of the disputed contract language in the Intercarrier Compensation Appendix concerning the definition and rates, terms and conditions of reciprocal compensation (IC-1, IC-3, IC-6, IC-10 and IC-14) as follows:

- IC-1: SBC's proposed § 3.1, identifying classifications of telecommunications traffic for purposes of reciprocal compensation under the agreement, is adopted. The definition of "*Section 251(b)(5) traffic*" in the Definitions Appendix shall be amended to include IP-enabled services traffic. (See discussion of DEF-18 at XIII.L.)

- IC-1: Level 3's proposed § 3.1 is rejected, as it does not distinguish among traffic types for purposes of compensation as directed in this report.

- IC-3: SBC's proposed § 3.2 is rejected. This section defines "*Section 251(b)(5) Traffic*," and is redundant of the definitional term in the Definition Appendix, which is addressed separately below in the discussion regarding DEF-18.

- IC-6: SBC's proposed § 3.6 is adopted, and Level 3's proposed language is rejected, except that both parties' proposed language regarding terms applicable to SBC Connecticut and the exchange of traffic in Connecticut is rejected, as it is not applicable in California.

- IC-10: SBC's proposed §§ 5 through 5.5 are adopted. They properly implements the FCC's *ISP Remand Order* with respect

to mirroring the FCC's ISP-bound traffic compensation rate for purposes of reciprocal compensation.

- IC-10: Level 3's proposed §§ 5 through 5.23 are rejected. They contemplate commingling of all traffic types over local interconnection trunks, contrary to resolution of that disputed issue, and do not appear to apply the appropriate compensation to each respective traffic type as resolved in this arbitration.

- IC-14: SBC's proposed §§ 7 through 7.1 are adopted, and Level 3's is rejected. SBC's proposed language clearly identifies the telecommunications traffic types that are subject to reciprocal compensation under the agreement.

E. Other Intercarrier Compensation Issues

1. Routing for IP-to-PSTN and PSTN-IP-PSTN Traffic

SBC proposes to require that IP-enabled services traffic (IP-to-PSTN and PSTN-to-IP) and PSTN-IP-PSTN traffic be routed over feature group trunk groups. Level 3 proposes to commingle all traffic, and specifically IP-enabled services traffic, over local interconnection trunks. As discussed in detail at IV.A below, Level 3 is permitted to transport IP-enabled services traffic over local interconnection trunks. However, PSTN-IP-PSTN is subject to access charges and shall be routed over Feature Group D trunks.

SBC proposes language requiring the parties to work cooperatively to identify and remove switched access traffic that is not permitted over local interconnection groups. SBC's proposed language is accepted.

Level 3 proposes language stating that disputes over the jurisdictional nature or classification of traffic shall be resolved through the agreement's dispute resolution process and applicable law. This language provides added clarity that routing and classification disputes are subject to dispute resolution.

However, I reject portions of Level 3's proposed language as unnecessary and improper for inclusion in a contract. In addition, the reference to "applicable law" as an alternative to the agreement's dispute resolution process is rejected, consistent with the discussion at Section V.B.

Accordingly, I dispose of IC-4 as follows:

- Level 3's proposed § 4.7, which states "*PARTIES AGREE TO ERECT NO BARRIERS TO IP-ENABLED SERVICES TRAFFIC,*" is rejected. This language is unnecessary to effect the purpose of ensuring that IP-enabled services traffic is routed over local interconnection trunks, it is reasonably subject to different interpretations, and it improperly requires parties to contractually agree to a policy, factual or legal statement.

- Level 3's proposed § 4.7.1 is rejected. This language presents a description of the requirements of Level 3's net protocol conversion service. This language is unnecessary to effect the purpose of the contract, and it is improper to require parties to contractually agree to what services Level 3 provides to its customers.

- Level 3's proposed § 4.7.2 is adopted. It states that parties will exchange IP-enabled services traffic over local interconnection trunks.

- Level 3's proposed § 4.7.2.1 is adopted, except that the phrase "*and according to Applicable Law*" is deleted. It provides appropriate clarification that disputes over classification of traffic shall be resolved through the agreement's dispute resolution process.

- SBC's proposed § 16.2 is rejected. It describes a dispute resolution process regarding misrouting of traffic distinct from the agreement's dispute resolution process, which confuses the terms governing such dispute resolution.

2. Compensation for Test Traffic

SBC and Level 3 appear to agree that test calls are not subject to intercarrier compensation, and that intercarrier compensation should begin once Level 3's interconnection is complete. Nevertheless, the parties offer dueling language. Level 3's proposed language is phrased in the negative, and provides that compensation does not apply to test calls. SBC's proposed language is phrased in the affirmative, and provides that the parties' compensation obligations begin when they agree that interconnection is complete, including when Level 3 has established all of its traffic trunks, including ancillary 911 trunks.

Level 3 complains that SBC's language would allow SBC to bill for test calls and to withhold compensation on a unilateral claim that Level 3 has not completed its 911 trunks.

SBC asserts that its language properly exempts test traffic from intercarrier compensation because it allows both parties to define when interconnection is complete. SBC complains that Level 3's language improperly references access charges that are not subject to a Section 252 arbitration agreement.

I adopt SBC's proposed language. To the extent that Level 3 believes that SBC is billing for test calls before interconnection is complete, or not compensating Level 3 for traffic after interconnection is complete, it may pursue dispute resolution under the agreement. Accordingly, with respect to IC-7, SBC's proposed § 3.7 is adopted and Level 3's proposed § 3.7 is rejected.

3. SS7 Call Setup Message and Duty to Provide Call Records

This issue relates to the identification of originating IP-enabled services traffic. SBC proposes that the agreement require the parties to provide Calling Party Number (CPN) information on all traffic, including IP-enabled services

traffic. According to SBC, this information is needed to determine whether the calls are local, intraLATA or interLATA so that appropriate charges can be applied and to ensure that exchange traffic is not improperly routed over local interconnection trunks.[24]

With respect to IC-8, Level 3 proposes that the agreement not limit the information to CPN, but rather permit the parties to provide "call records" to take into account other means of identifying IP-enabled traffic. Although Level 3's statement of the issue in the Disputed Points List poses the assumption that providing CPN would be unreasonably costly, Level 3's witness admitted at the hearing that it is feasible for Level 3 to deliver CPN for its originating VoIP traffic, and Level 3's cursory discussion of the issue in its briefs suggests that the alleged cost is associated with separating out "intrastate components" of IP-enabled services traffic, and not with providing CPN itself.

Elsewhere, with respect to IC-2(f), Level 3 proposes, and SBC opposes, language directing Level 3 to insert into the SS7 call setup message an indicator that will allow the parties to identify IP-enabled services traffic that originates on Level 3's network.[25] SBC objects to this proposal as there is currently no industry standard for identifying originating IP-enabled services traffic.

As determined elsewhere in this report, IP-enabled services traffic is subject to reciprocal compensation and may be routed over local interconnection

[24] The CPN would only be a proxy for the physical location of the IP originating end user, as the end user could be anywhere in the world. The end user's actual physical location is indeterminable.

[25] It appears, and this discussion assumes, that the parties' references to a SS7 call setup message and to a Originating Line Identifier code refer to the same method for identifying originating IP-enabled services traffic.

trunks. Thus this issue of identifying misrouted traffic boils down to how to distinguish originating IP-enabled services traffic from Level 3 originating traffic that is not IP-enabled and therefore not properly routed over local interconnection trunks.

The only practical approach offered in this record is to require Level 3 to provide CPN on all its originating traffic, including VoIP, and for Level 3 to identify its originating IP-enabled services traffic by inserting a call setup message in the SS7. SBC offers no other suggestion for distinguishing between IP-enabled services traffic that is subject to reciprocal compensation and traffic that is subject to access charges.

Accordingly, I dispose of IC-8 and IC-2(f) as follows:

- IC-8: SBC's proposed § 4.1 is adopted, and Level 3's proposed § 4.1 is rejected.
- IC-2(F): Level 3's proposed § 3.2.2.3 is adopted.

4. Dispute Resolution for ISP-Bound Traffic

Both parties agree that the dispute resolution process for ISP-bound traffic will be the same as for Section 251(b)(5) traffic. Nevertheless, the parties propose dueling language to this effect.

Level 3 proposes language that states that the dispute resolution process applies to "any dispute […] over the jurisdictional nature or classification of traffic." SBC opposes this language as overbroad because it applies to "all traffic" as opposed to ISP-bound traffic and Section 251(b)(5) traffic.

SBC proposes language stating that all terms and conditions regarding disputed billing and payment terms shall apply to ISP-bound traffic "the same as for Section 251(b)(5) Traffic" and that parties will not block the other's traffic without following the dispute resolution process. Although Level 3 recommends

its proposed language over SBC's "in order to avoid creating disparate [dispute resolution] processes," it does not articulate how SBC's might do that.

I dispose of IC-9 by adopting SBC's § 5.6, and rejecting Level 3's § 4.7.2.1.

5. Compensation for Unbundled Local Switching Traffic

Level 3 opposes SBC's proposed language regarding compensation for local switching traffic to the extent that it would supersede the terms and conditions of the Unbundled Network Elements Appendix of the parties' current agreement. As discussed in greater detail at Section VII, Level 3's position that it is entitled to the terms and conditions applicable to declassified UNEs contained in the parties' current UNE appendix is rejected. Accordingly, I dispose of IC-12 by adopting SBC's proposed § 5.7, except that I do not adopt the disputed language of §§ 5.7.1 and 5.7.4, as they do not apply in California.

6. Compensation and Billing Information for intraLATA 800 calls

This issue concerns (1) whether parties should be required to provide Access Detail Usage and Copy Detail Usage for intraLATA 800 calls in Exchange Message Interface format, and (2) what intercarrier compensation applies to intraLATA 8YY traffic that bears translated NPA-NXX codes that are local to the point where traffic is exchanged.

Level 3 proposes language that permits the parties to provide the "equivalent" of Access Detail Usage and Copy Detail Usage, and to provide it in any "other mutually agreeable format." This language is unnecessary. To the extent that the parties wish to exchange other information that may be more useful, they are free to negotiate such arrangements.

Level 3 proposes that the NPA-NXX of the calling parties determine if the call to the 8YY number is local for billing purposes. SBC opposes this language.

Consistent with the treatment of FX traffic in this arbitrated agreement, I reject Level 3's proposal. As discussed with respect to FX traffic (at Section III.C, above), NPA-NXX manipulation does not entitle carriers to reciprocal compensation where other compensation otherwise applies.

Accordingly, I dispose of IC-18 by adopting SBC's proposed §§ 11 through 11.2, and rejecting Level 3's proposed language.

7. Compensation and Billing Information for Meet-Point Billing

This issue concerns (1) whether Level 3 must provide records formatted according to the Ordering and Billing Forum's Multiple Exchange Carrier Access Billing (MECAB) standard, (2) whether meet point billing or switched access traffic compensation apply to IP-enabled services traffic, and (3) whether the agreement should limit the parties' ability to bill "to the extent permitted by Applicable Law."

Level 3 proposes that the agreement not limit the format of the records to MECAB, but rather permit the parties to provide "call records" to take into account other means of identifying IP-enabled traffic. This language is unnecessary. To the extent that the parties wish to exchange other information that may be more useful, they are free to negotiate such arrangements.

Level 3 opposes SBC's term "Switched Access Services" and would replace it with the term "Circuit Switched Traffic." Although Level 3 does not separately address Disputed Issue IC-19 in its briefs, its concern appears to be that the term "Switched Access Services" will permit SBC to mistreat IP-enabled services traffic as intraLATA toll. SBC opposes the term "Circuit Switched Traffic" because it improperly encompasses intraLATA toll traffic that is not subject to meet point billing, e.g., where there is no third-party toll carrier in the middle of the call.

The term "Circuit Switched Traffic" does not necessarily, and in any event is not necessary to, define non-IP-enabled services traffic for the purpose of this arbitration agreement. As discussed at Section III.A, this arbitrated agreement will define IP-enabled services traffic by reference to its net conversion between IP and TDM format for communication between Internet and PSTN users. Modifying § 14.1 (discussed at Section III.E.9, below) to clarify that IP-enabled services traffic is not intraLATA toll traffic for purposes of this agreement will sufficiently protect against the misapplication of meet point billing to IP-enabled services traffic. With that modification, SBC's proposed term "Switched Access Service" more accurately reflects the traffic at issue in this section.

Level 3 does not address its reason for proposing the caveat "to the extent permitted by Applicable Law." It goes without saying that this agreement and its terms function only to the extent permitted by law.

Accordingly, I dispose of IC-19 by adopting SBC's proposed §§ 12 through 12.9, and rejecting Level 3's proposed §§ 12 through 12.9, except that Level 3's proposed 90-day period for parties to reconstruct lost data is adopted pursuant to the parties' agreement.

8. IntraLATA Toll Traffic Compensation

This issue concerns (1) the applicability of intraLATA toll traffic compensation to IP-enabled services traffic, (2) capping Level 3's compensation for the exchange of intraLATA toll traffic at the compensation contained in SBC's tariff, and (3) applying transport, tandem switching and end office rates to cases where traffic is terminated to a switch "providing equivalent geographic coverage."

Level 3 proposes to limit the application of intraLATA toll traffic compensation to "Circuit-Switched Traffic," in order to ensure that SBC does not

improperly apply intraLATA toll traffic compensation to IP-enabled services traffic. SBC opposes this qualifier. As discussed earlier, modifying § 14.1 to clarify that IP-enabled services traffic is not intraLATA toll traffic for purposes of this agreement will sufficiently protect against the misapplication of meet point billing to IP-enabled services traffic. With that modification, SBC's proposed language more accurately reflects the traffic at issue in this section.

Level 3 does not articulate the reason for its opposition to SBC's proposed language regarding caps on interstate switched access rates. SBC's proposed language appears to be consistent with 47 C.F.R. § 61.26(b)(1).

Level 3 does not address the reason for its proposal to charge tandem rates where a switch providing equivalent geographic coverage is used to terminate traffic. To the extent its proposed language is intended to ensure proper treatment of its IP-enabled services traffic, that concern is adequately addressed elsewhere in the arbitrated agreement.

Accordingly, I dispose of IC-20 by adopting SBC's proposed § 14-14.1, except that a sentence shall be added to § 14.1 specifying that "IntraLATA toll traffic does not include IP-enabled services traffic."

9. Originating Carrier Number Records

Level 3 proposes language that would require SBC to provide Originating Carrier Number (OCn) records to Level 3 when Level 3 is technically incapable of billing the original carrier through the use of terminating records. SBC opposes Level 3's proposed language, charging that CPN is the proper call information to be provided. Because Level 3 does not address this issue or articulate the basis for its proposal in its briefs, I do not require SBC to provide the information.

In accord with the earlier disposition of the issue, I reject Level 3's proposed expression "Circuit Switched" and adopt SBC's proposed expression "Section 251(b)(5)" for purposes of identifying the traffic subject to this contract term. In accord with the earlier disposition of the issue, I reject Level 3's proposed language that would maintain the parties' current rate for the exchange of ISP-bound traffic, and adopt SBC's proposed language that references the FCC's interim ISP compensation plan as the basis for compensation for ISP-bound traffic.

Accordingly, I resolve IC-21 by adopting SBC's proposed §§ 15 through 15.2, and rejecting Level 3's proposed §§ 15 through 15.2.

10. Reservation of Rights Concerning Compensation for ISP-Bound Traffic

SBC proposes terms to reserve the parties' rights specifically with regard to ISP-bound traffic. SBC states that, because the FCC's ISP compensation plan is, by definition, interim, and because the FCC has stated its intention to further review and potentially revise intercarrier compensation as a result of the Notice of Proposed Rulemaking (NPRM) to address intercarrier compensation on a more general basis,[26] a special reservation of rights and intervening law provision is appropriate to address such forthcoming changes.

Level 3 agrees to the initial portion of SBC's proposed language, but opposes SBC's continuing language because it articulates its own interpretations of legal actions and concerns related to the FCC *ISP Remand Order*, and imposes them on Level 3 by presenting them as a "joint" acknowledgement of the status

[26] *Intercarrier Compensation NPRM*, CC Docket No. 01-92, FCC 01-132 (rel. April 27, 2001).

of the legal landscape. Level 3 states that SBC's "endless expression" will burden the agreement, and recommends that the Commission adopt its more cogent option which is to expressly reserve the parties' rights, and leave it at that.

I reject the majority of SBC's disputed proposed language, as it is unreasonably protracted and redundant, and will lead to unnecessary confusion. In addition, much of the disputed proposed language is inapplicable to California as it addresses circumstances where SBC has not already elected to offer to exchange traffic pursuant to the FCC's interim ISP compensation plan.

Accordingly, I resolve IC-22 by rejecting SBC's proposed language in §§ 18.1 through 18.6, and adding the following statement to § 18.1:

> This includes, but is not limited to, the right to negotiate appropriate amendments to conform to modifications of the *ISP Remand Order*, and to obtain reimbursements for any prior intercarrier compensation that was paid for under terms that are later found to be null and void and subject to retroactive adjustment.

IV. Interconnection Trunking Requirements

A. Combining Traffic Types On Local Interconnection Trunks

SBC proposes separate trunking requirements depending on the type of telecommunications traffic. SBC seeks to have Level 3 use local interconnection trunks for Section 251(b)(5), intraLATA toll (not carried by an interexchange carrier) traffic,[27] and ISP-bound traffic, and separate Feature Group D Access trunks for interLATA traffic "where Level 3 is acting in its capacity as an IXC." SBC states that separating the traffic types in this manner is necessary to ensure that each type of traffic is accurately billed based on the appropriate compensation or access charges. SBC further states that its federal access tariff requires that traffic to or from an interexchange carrier shall be carried on Feature Group D trunks that are dedicated to interexchange, access traffic.

Much of SBC's argument is premised on IP-enabled services traffic being subject to access charges. However, as discussed at Section III.A, IP-enabled services traffic is not subject to access charges under the current regulatory regime. Accordingly, SBC's rationale for requiring Level 3 to transport IP-enabled services traffic over Feature Group D Access trunks, and not local interconnection trunks, is rejected.

The next question is whether Level 3 should be required to route its own interexchange traffic over Feature Group D Access trunks. Specifically, Level 3

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[27] SBC permits Level 3 to transport intraLATA toll traffic that is not from an interexchange carrier over local interconnection trunks rather than Feature Group D trunks because, as the carrier of the traffic, SBC is able to capture the necessary call information to permit accurate billing. The parties agree that Level 3 will establish a separate trunk group for traffic that is exchanged to and from Level 3 end users and a third party interexchange carrier, or "Meet Point Traffic."

acknowledges that it may originate or terminate PSTN-IP-PSTN traffic and that such traffic is subject to access charges.[28] Level 3 proposes to use Percent of Local Use, Percent of Interstate Use, and Percent of IP Use allocators to identify and properly compensate the different traffic types.

Level 3 refers to the Commission's observation in D.03-05-031 that "the concept of an interconnecting carrier having to identify traffic for purposes of rating by the local carrier is already an industry practice." However, it is not clear whether Level 3's proposal to commingle interstate interexchange traffic on local interconnection trunks is the industry practice to which the Commission referred. Other authority suggests it is not. For example, although Level 3 maintains that the Commission endorsed the commingling of traffic types in the 2000 arbitration between SBC and AT&T, that arbitration concerned the commingling of intraLATA toll traffic, not interstate interexchange traffic.[29] Level 3 refers to the FCC's *Virginia Arbitration Order*,[30] which took Verizon to task for opposing the commingling of traffic. There again, however, the issue concerned the commingling of 251(b)(5) traffic and toll traffic. Level 3 also points to SBC's model interconnection agreements filed as part of its Section 271

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[28] PSTN-IP-PSTN traffic is traffic that originates and terminates in PSTN format, although it undergoes protocol conversions in the "middle."

[29] *Application of AT&T Communications of California, Inc. for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company*, A.00-01-022.

[30] *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket No. 00-218 et al., Memorandum Opinion and Order, DA 02-1731 ¶57 (re. July 17, 2002) (*Virginia Arbitration Order).*

application process in Arkansas, Missouri, and Texas,[31] in which the CLEC would be permitted to commingle traffic, but those model agreements similarly limit the commingling to local, interLATA toll, and intraLATA toll traffic.

Level 3 asserts that, because it is technically feasible to carry jurisdictionally distinct traffic over a single trunk group, Section 251(c)(2) requires that Level 3 be permitted to do so. I am not persuaded that Section 251(c)(2), which requires interconnection "at any technically feasible *point*," requires it to be accomplished in any technically feasible *fashion* without regard to other legitimate considerations.

Level 3 asserts that it should be permitted to commingle switched access traffic with Section 251(b)(5) traffic on local interconnection trunks because the ostensible purpose of segregating traffic on Feature Group D facilities – the identification and proper billing of switched access traffic – can be accomplished without the need for costly, redundant facilities. Specifically, Level 3 proposes to calculate the volumes of different traffic types by using Percent of Interstate Use and Percent of Local Use allocators, both of which are industry standards based on the NPA-NXX of the originating and terminating numbers. In addition, because Level 3 would commingle IP-enabled traffic on the local interconnection trunks, that traffic must also be identified in order to extrapolate the traffic that is subject to access charges. For this purpose, Level 3 proposes to develop a Percent of IP Use allocator by attaching an Originating Line Identifier (OLI) to its call records to identify calls that originate as IP-enabled traffic. However, as Level 3 acknowledges, there is currently no industry standard for its proposed

[31] Level 3's request for official notice of these documents is granted.

Originating Line Identifier code. Level 3's offer to allow SBC to audit its records is not a reasonable proxy for an industry standard allocator; in any event, Level 3 has not proposed any contract language to effect that proposal.

Level 3 is permitted to transport IP-enabled traffic on local interconnection trunks. Level 3 is not permitted to commingle interexchange access traffic (other than intraLATA toll traffic that is not carried by an interexchange carrier), including PSTN-IP-PSTN traffic, on local interconnection trunks. To the extent that Level 3 intends to transport interexchange traffic, it shall maintain separate Feature Group D trunks for that purpose (other than intraLATA toll traffic that is carried by an interexchange carrier; such traffic may be exchanged over Meet Point trunks.)[32] Accordingly, I resolve the disputed contract language relating to ITR-1, ITR-2, ITR-11, ITR-12, ITR-18, ITR-19, IC-2 and IC-17 as follows:

- ITR-1: Level 3's proposed § 1.2 is rejected, and SBC's proposed § 1.2 is adopted, except that the term "*IP-enabled services traffic*" shall be included as a traffic type subject to exchange under this section.

- ITR-2: Level 3's proposed § 3.3 is rejected, and SBC's proposed § 3.3 is adopted, except that (1) the term "*IP-enabled services traffic*" shall be included as a traffic type subject to combination and exchange over Local Interconnection Trunk Group(s), and (2) the phrase "*for the exchange of traffic between each Party's End Users only*" shall be deleted, as discussed in IV.B.1.

- ITR-11: Level 3's proposed §§ 5.3 through 5.3.2.1 are rejected, and SBC's proposed §§ 5.3 through 5.3.2.1 are adopted, except that the term "*IP-enabled services and ISP-bound traffic*" shall be

[32] See footnote 27.

included as a traffic type subject to combination and exchange over Local Interconnection Trunk Groups, as discussed in this section and at IV.A.

- ITR-12: Level 3's proposed § 5.3.3.1 is rejected, and SBC's proposed § 5.3.3.1 is adopted, except that the term "*IP-enabled services traffic*" shall be included as a traffic type subject to combination and exchange over Local Interconnection Trunk Groups.

- ITR-18: SBC's proposed § 12.1 is adopted, except that the phrase beginning "*including, without limitation, any traffic that…*" through but not including the phrase "*provided, however, the following categories…*"is deleted, and the phrase, "*provided, however, that Switched Access Traffic does not include IP-enabled services traffic*" is added in its stead. Level 3's proposed §§ 12 and 12.1 are rejected.

- ITR-19: Level 3's proposed §§ 13 through 13.1 are rejected. Its purpose is to clarify that IP-enabled services traffic is not subject to access charges. Other modifications ordered by this arbitration report adequately provide that clarification.

- IC-2: Level 3's proposed IC §§ 3.2.2.4 through 3.2.2.5 are rejected. This language provides for the development of a Percentage of IP Use factor for identifying traffic that originates or terminates as IP, for purposes of commingling and distinguishing traffic that is subject to access charges. As traffic subject to access charges may not be routed over local interconnection trunks, these terms are not appropriate.

- IC-17: SBC's proposed § 10.1 is adopted, and Level 3's is rejected. Level 3's proposed language would improperly permit the routing of interexchange traffic over local interconnection trunks.

B. Transit Traffic

1. Is Transit Traffic Subject to Arbitration?

SBC maintains that transit traffic, or traffic that originates or terminates with a third party, is not subject to arbitration under Section 251 or Section 252 of the 1996 Telecommunications Act. SBC's interpretation is rejected.

Section 251(c)(1) requires incumbent local exchange carriers to negotiate the duties in Section 251(b), including the Section 251(b)(2) duty to establish reciprocal compensation arrangements "for the transport and termination of telecommunications." Nothing in the plain language of Section 251(b)(5) limits such telecommunications to telecommunications that either originates or terminates on SBC's network. Transit traffic is a type of telecommunications subject to transport and reciprocal compensation under Section 251(b)(5), and negotiation under Section 251(c)(1).

SBC points to Level 3's witness Hunt's statement that "[t]here is no FCC rule that requires SBC to transit traffic under Sections 251 and 252" as support for its conclusion that transit traffic is not subject to arbitration. This is beside the point. As SBC notes, the FCC has not yet determined, by rule or any other order, whether transit traffic is subject to arbitration because that issue has not yet been before it. SBC has elected to place the issue before this Commission to determine as matter of first impression in this State.

SBC states that the Section 251(c)(2) duty to interconnect implies only a duty to directly interconnect with another carrier for the mutual exchange of traffic. SBC contends that, even if Section 251(a)(1) imposes the duty to interconnect "indirectly" with other carriers, the duty to negotiate is limited to the duties in Sections 251(b) and (c) and does not extend to Section 251(a) duties.

As SBC states, Section 251(c)(2) does not require incumbent local exchange carriers to establish indirect connections between other carriers. Thus, for example, if Level 3 wishes to indirectly interconnect with a third party carrier

with whom SBC is not currently interconnected, SBC of course has no obligation to establish such indirect interconnection on Level 3's behalf. However, to the extent that such indirect interconnections exist between other carriers, SBC has a duty to negotiate and establish reciprocal compensation arrangements for transporting transit traffic under Section 251(b)(5). This result is consistent with sound, pro-competitive policy which dictates that the incumbent carrier, who has ubiquitous interconnections to third-party providers, be required to transit traffic where existing interconnections permit.

In its comments on the Draft Arbitrator's Report, SBC argues that the plain language of 47 C.F.R. § 51.701(e) and Section 252(d)(2)(A), and specifically the phrase that refers to "the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," is a formulation that cannot apply to transit traffic because it originates on the network of a third party carrier. To the extent that SBC's statement is true, it is irrelevant to this agreement. Not all transit traffic originates on the network facilities of a third party carrier. Transit traffic also originates on Level 3's network for transport to the network of a third party carrier, and it is this traffic that is the subject of the pricing arrangement between SBC and Level 3. The formulation of the plain language of 47 C.F.R. § 51.701(e) and Section 252(d)(2)(A) applies to transit traffic in that originates on Level 3's network. Transit traffic that originates on Level 3's network for transport by SBC to a third party carrier is subject to reciprocal compensation under Section 251(b)(5).

SBC cites to *Pacific Bell v. Pac-West Telecomm, Inc.*, where the Ninth Circuit Court stated that "reciprocal compensation" means payment by one local

exchange carrier to a second local exchange carrier for terminating a call from the first carrier's customer to a customer of the second carrier.[33] However, *Pacific Bell v. Pac-West Telecomm, Inc.* concerned whether ISP-bound traffic is "local" for the purposes of being subject to reciprocal compensation under Section 251(b)(5); it did not concern or require consideration of whether Section 251(b)(5) requires that traffic both originate and terminate with customers of the interconnecting parties in order to qualify for reciprocal compensation. The Ninth Circuit's characterization of Section 251(b)(5) in the introductory background section of the opinion is dicta and is not binding.

SBC assures the Commission that, were it to find that transiting is not subject to arbitration, SBC will nevertheless provide transiting pursuant to separate arrangements. SBC's assurance that it intends to enter into such arrangements is not a reasonable substitute for providing competitors recourse to arbitration in the event that SBC declines to do so under reasonable terms.

2. What Terms and Conditions Should Apply to Transit Traffic?

SBC requests that, in the event the Commission concludes that transiting terms and conditions should be included in the agreement, it adopt SBC's proposed Transit Traffic Service Appendix, because it is more comprehensive than Level 3's proposed transiting language, for the Interconnection Trunking Requirements Appendix.

I reject SBC's Transit Traffic Service Appendix. It is indeed comprehensive, but it is comprehensively filled with statements and definitions that contradict the conclusions of this arbitration, particularly with respect to

[33] 325 F.3d 1114, 1119-20 (9th Cir. 2003).

SBC's obligation to provide transit traffic under Sections 251 and 252, and compensation and routing for IP-enabled services traffic. Accordingly, Level 3's proposed language makes a better starting point for determining the terms and conditions for the exchange of transit traffic.

Level 3's proposed transiting language states that Level 3 will be required to establish direct trunks when traffic reaches a DS1 or greater level for three consecutive months. SBC objects to this language to the extent that it fails to specify a time frame within which direct interconnection must be established after the trigger is reached, and requires only that Level 3 use "commercially reasonable efforts" to enter into interconnection agreements with third party carriers. SBC proposes that Level 3 be required to establish direct trunks, and cease transiting traffic, within 60 days.

I reject SBC's proposed 60-day deadline for the establishment of direct trunking and interconnection. As Level 3 witness Hunt explained, Level 3 does not have the ability to meet a specific deadline for establishing interconnection agreements with third party carriers because non-incumbent carriers are not required to negotiate interconnection under Sections 251 and 252.

SBC objects that Level 3's proposed language takes the teeth out any requirement to directly interconnect. SBC proposes to increase the price of transiting after 50 million minutes of use in a month to provide an incentive to Level 3 to pursue the required direct interconnections. Countering this concern, Level 3 witness Ducloo asserts that SBC's "base" transit service charge already provides a financial incentive for originating carriers to establish direct connections when traffic reaches the one DS1 threshold. In any event, as Level 3 points out in its comments on the Draft Arbitrator's Report and as SBC does not dispute, to the extent that transit traffic is subject to Section 251(b)(5) reciprocal

compensation, the rates must be TELRIC-based. SBC's second-tier pricing proposal violates this requirement.

SBC also opposes Level 3's proposed language requiring SBC to notify Level 3 that the obligation to establish direct interconnection arrangements has been triggered. Level 3 is able to determine when its obligation to establish direct interconnection begins under these terms. This language is therefore unnecessary.

SBC opposes Level 3's proposed language requiring SBC to use reasonable efforts to minimize the amount of transit traffic it routes through Level 3's network. Level 3's witness DuCloo stated that, to the extent Level 3 is compensated for transiting SBC traffic at the same rates as SBC charges for transiting Level 3 traffic, Level 3 agrees to strike the objectionable sentence.

SBC objects to Level 3's language because it doesn't provide that Level 3 will not strip, alter, add, delete or change CPN. As an explanation for this objection, SBC refers to its discussion regarding ITR-11, where SBC discusses the need for Level 3 to route interexchange traffic over Feature Group D trunks. That discussion provides no insight into why SBC believes it needs a term in the agreement specifying, in essence, that the parties will not engage in fraud, or why such prohibition against fraudulent behavior should be limited to the use of CPN and not other representations by the parties.

Finally, SBC objects to Level 3's proposed language for being silent on pricing. It appears that the parties do not dispute SBC's proposed transit pricing for below 50 million minutes per month volumes. The agreement shall provide for that transit pricing, and shall apply it to all volumes.

Accordingly, I dispose of ITR-5, ITR-6, ITR-8, and ITR-9 as follows:

- ITR-5: Level 3's proposed § 4.3 is adopted. It provides that Level 3 shall undertake commercially reasonable efforts to establish direct interconnection when transit traffic to a third party carrier exceeds DS-1 for three consecutive months.

- ITR-6: Level 3's proposed § 4.3.1 is adopted, except that the last sentence regarding SBC's reasonable efforts to minimize transiting traffic through Level 3 is rejected.

- ITR-8: Level 3's proposed § 4.3.3 requires parties to transit traffic until the earlier of when the party arranged interconnection with the third-party carrier or the date transit traffic volumes exceed the volumes specified in Section 4.2.2. This language is contrary to Level 3's stated purpose in that it would end the transiting requirement immediately upon the time that the direct interconnection trigger is met. In addition, there is no ITR Appendix Section 4.2.2. This language shall be amended to provide that the parties will provide transit service until direct interconnection is established.

- ITR-9: Level 3's § 4.3.4 is rejected, as it unnecessarily puts the burden on SBC to notify Level 3 when it must establish a direct connection to a third party.

- SBC's proposed transit traffic rates for up to 50,000,000 minutes of use are adopted, except that they shall apply to all volumes.

V. Network Interconnection Method

A. Responsibility for Trunk Groups

This dispute concerns whether the parties' agreement to provide sufficient facilities required for the exchange of traffic should refer to "local interconnection trunk groups" as SBC proposes or simply "trunk groups" as Level 3 proposes.

SBC opposes the broad term "trunk groups" as potentially requiring SBC to be financially responsible for facilities that carry trunk groups for which Level 3 is responsible. Level 3 contends that this issue relates to, and should be disposed of consistent with, Disputed Issue ITR-2 regarding whether Level 3 may commingle all traffic types over local interconnection trunks or, conversely, if it must route interexchange traffic over Feature Group D trunks.

Consistent with the earlier determination that interexchange traffic (which does not include IP-enabled services traffic) shall be routed on Feature Group D trunks, I dispose of NIM-5 by adopting SBC's proposed language for NIM § 2.7, and rejecting Level 3's.

B. "Applicable Law" as Physical Collocation Option

This dispute in NIM-7 is whether Level 3 may reserve the option of interconnecting "according to Applicable Law," in addition to the agreed-upon options of interconnecting either under the provisions of this agreement or under applicable state tariff. Level 3 states that it requires this third option to reserve its rights pursuant to legal proceedings that may impact the agreement and to changes in SBC's tariffs.

I reject Level 3's proposed insert to NIM §§ 3.1.1 and 3.2.1. The intervening law provision in the General Terms and Conditions (GT&C) Appendix adequately reserves the parties' rights pursuant to legislative, administrative or court proceedings that affect the collocation methods identified in the agreement. The proposed language of GT&C § 21 does not, however, adequately reserve the parties' rights with respect to modifications or invalidations of applicable state tariffs. Accordingly, as directed at Sections VI.A and XII.C, the phrase "applicable state tariffs" shall be inserted into GT&C § 21.1 to indicate that modifications to state tariffs are a form of intervening law.

VI. Collocation

A. State Tariff as Collocation Option

Level 3 proposes that it be allowed to choose between the negotiated terms specified in the Agreement and those contained in SBC's state tariff for purposes of collocating with SBC. SBC contends that the negotiated terms in the Physical Collocation and Virtual Collocation Appendices should be the exclusive terms governing the parties' physical and virtual collocation arrangements.

SBC points to the FCC's "all or nothing" rule that prohibits carriers from picking and choosing from among collocation rates, terms and conditions from another interconnection agreement. However, as SBC acknowledges, the FCC's "all or nothing" rule was made in a different context. It is one thing to allow a carrier to pick and choose between individual terms that were negotiated in the context of a comprehensive agreement; doing so creates a disincentive to give and take in interconnection agreements. It is another thing to allow a carrier to opt into a state tariff.

SBC cites decisions by the federal courts of appeal in the 6th and 7th Circuits rejecting certain state commissions' orders requiring the incumbent local exchange carriers to file tariffs setting forth interconnection rates and terms as alternatives to negotiation and arbitration under the Telecommunications Act,[34] and argues that that interconnection agreements are the exclusive vehicle through which a competitive local exchange carrier obtains interconnection or access to an incumbent local exchange carrier's UNEs.

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[34] See *Wisconsin Bell, Inc. v. Bie,* 340 F.3d 441 (7th Cir. 2003); *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n,* 359 F.3d 493 (7th Cir. 2004); *Verizon North, Inc. v. Strand,* 367 F.3d 577 (6th Cir. 2004); and *Verizon North, Inc. v. Strand,* 309 F.3d 935 (6th Cir. 2002).

However, as the court found in *U.S. West Communications, Inc. v. Sprint Communications Co.*,[35] and as cited favorably in *Verizon North*,[36] a provision in an interconnection agreement allowing a competitor to elect services at the rates and terms set forth in state tariffs filed by the incumbent in addition to the rates and terms set forth in the interconnection agreement is distinguishable from requiring incumbents to file state tariffs as alternatives to negotiation and arbitration. Such a provision "does not eliminate interconnection agreements, but rather is part of one" and "does not result in abandonment of the interconnection agreement" between the competitor and the incumbent.[37]

SBC asserted in its brief that in any event it has no collocation tariff in California, making Level 3's proposal irrelevant. The Draft Arbitrator's Report rejected Level 3's language on the basis that it makes no sense for the agreement's collocation terms to make reference to non-existent California collocation tariffs. In its comments on the Draft Arbitrator's Report, Level 3 reiterates its statement in its reply brief disputing SBC's claim that it has no collocation tariff in California, cites to Cal. Schedule P.U.C. No. 175-T, Section 16, and refers to http://www.sbc.com/Large-Files/RIMS/California/Access/ca-ac-16.pdf. SBC, in its reply comments on the Draft Arbitrator's Report, does not dispute this reference, but maintains that Level 3's language should be rejected regardless of whether there is a collocation tariff in California because it is unlawful.

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[35] 275 F.3d 1241, 1251 (10th Cir. 2002).

[36] 309 F.3d at 943.

[37] 275 F.3d at 1251.

I reject SBC's assertion that federal law bars an interconnection agreement from providing that a competitor may purchase services at the rates and terms set forth in the incumbent's tariff. The tariff cited by Level 3 is a Commission-approved tariff. It is reasonable to provide that Level 3 may opt for the rates and terms set forth in SBC's tariff in addition to those specified in the interconnection agreement.

I therefore adopt Level 3's proposed language in § 7.3 of the Physical Collocation Appendix, and reject SBC's proposed language in § 4.4 of the Physical Collocation Appendix and §§ 1.2 and 1.10 of the Virtual Collocation Appendix.

B. Collocation of Equipment SBC Believes is Non-Compliant

This dispute concerns whether Level 3 should be permitted to collocate equipment that SBC believes is non-compliant while the dispute over such compliance or non-compliance is pending. SBC and Level 3 agree that Level 3 is not permitted to collocate unnecessary or unsafe equipment. Level 3 contends, however, that SBC's proposed language precluding collocation of disputed equipment pending dispute resolution unreasonably gives SBC the unilateral discretion to deny collocation.

Contrary to Level 3's complaint, precluding the collocation of equipment while a dispute over its compliance is pending does not give SBC unilateral discretion over its placement. The agreement's dispute resolution procedures guard against such abuse.

Level 3 complains that SBC's proposed language allows it to unnecessarily delay Level 3's ability to compete and provide services to its customers. By way of example, Level 3's witness Bilderback describes an episode where SBC disputed Level 3's representation that its proposed collocation equipment met

safety standards, resulting in a delay of over a month in the collocation of equipment that SBC ultimately agreed could be collocated.

It is tautological that precluding collocation while a dispute is pending will result in unnecessary delay if the equipment is ultimately determined to be safe or necessary. However, precluding collocation of equipment while a dispute is pending may also prevent harm to SBC's system, as a result of unsafe equipment, or unnecessary cost to Level 3, as a result of having to remove unnecessary equipment, in the event that collocation is ultimately denied. On balance, the more prudent course is to prohibit collocation pending the resolution of the dispute.

Level 3 asserts that SBC's proposed language is barred by 47 C.F.R. § 51.323(c) which provides that an incumbent local exchange carrier "may not object to the collocation of equipment on the grounds that the equipment does not comply with safety or engineering standards that are more stringent than the safety or engineering standards that the incumbent LEC applies to its own equipment." This provision has nothing to do with objections based on failure to meet applicable safety standards.

Level 3 asserts that the FCC's *Collocation Remand Order*[38] resolved this issue in Level 3's favor. To the contrary, the FCC order addressed the substantive interpretation of the term "necessary." It did not address whether equipment may be collocated while a dispute over whether the equipment is "necessary" is pending.

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[38] *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, *Fourth Report and Order,* 16 FCC Rcd 15345, FCC 01-204 (rel. Aug. 8, 2001), *aff'd sub nom. Verizon Telephone Cos. V. FCC,* 293 F.3d 903 (D.C. Cir. 2002).

The choice here is between permitting collocation during a dispute, and precluding it until and unless it is found to be in compliance. The prudent course is to preclude it until it is determined that the equipment meets applicable safety standards and is necessary.

Accordingly, I resolve Issues PC-2 and VC-2 by adopting SBC's proposed language in § 1.10.10 of the Virtual Collocation Appendix and § 6.13 of the Physical Collocation Appendix.

VII. Unbundled Network Elements

A. Background

Section 251(c)(3) requires incumbent local exchange carriers to provide unbundled access to those network elements that the FCC determines, under Section 251(d)(2), to be necessary, and to be required to avoid impairment of the requesting carrier's ability to provide its services. The terms and conditions for providing such UNEs are established in interconnection agreements.

The FCC first addressed these unbundling obligations in the 1996 *Local Competition Order*, which, among other things, established a list of seven UNEs which incumbent local exchange carriers were obliged to provide.[39] The courts affirmed some parts of the *Local Competition Order* and reversed others, vacating

[39] The seven UNEs were: (1) local loops, (2) network interface devices, (3) local and tandem switching, (4) interoffice transmission facilities, (5) signaling networks and call-related databases, (6) operations support systems, and (7) operator services and directory assistance. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15616-775 (1996) (*Local Competition Order*) (subsequent history omitted).

the specific unbundling rules at issue.[40] In response, the FCC issued the 1999 *UNE Remand Order* promulgating new unbundling rules. The D.C. Circuit vacated the order and remanded the portions establishing a list of mandatory UNEs.[41]

The FCC responded to *USTA I* in its August 2003 *Triennial Review Order*,[42] where it adopted new unbundling rules declassifying certain network elements as subject to unbundled access. For example, the FCC ruled that access to copper subloops is to be unbundled, but not access to feeder loop plant (*Id.*, ¶¶ 253-254); access to the dedicated transport network element is to be unbundled, but is narrowly defined to include only that equipment and facilities that coincide with the incumbent local exchange carrier's internal transport network (*Id.*, ¶ 366); OCn or SONET interface transport do not qualify as UNEs (*Id.*, ¶ 389); and nor do local circuit switches serving DS1 capacity and higher enterprise customers or mass market customers (*Id.*, ¶ 419). On appeal of the *Triennial Review Order*, the D.C. Circuit decided *USTA II* in which it vacated and remanded several of the *Triennial Review Order*'s rules requiring unbundling, but also upheld a number of elements.[43]

On December 15, 2004, the FCC issued a decision adopting new unbundling rules in light of *USTA II*, although the final order was not released

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[40] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S.366 (1999).

[41] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA I).*

[42] *Triennial Review Order*, 18 FCC Rcd 19,020 (rel. Aug. 21, 2003).

[43] The court upheld the FCC with respect to a number of elements including broadband loops, hybrid loops, enterprise switching and the Section 271 access obligation.

until February 4, 2005.[44] Meanwhile, it has adopted an interim plan for the transition to final unbundling rules. The *Interim Order* requires incumbent local exchange carriers to continue providing unbundled access to mass market switching, enterprise market loops, and dedicated transport under the rates, terms and conditions in their current agreements. (*Id.*, ¶¶ 1, 21.) These requirements will expire when the FCC's new unbundling rules take effect or on March 13, 2005 (six months from Federal Register publication of the *Interim Order*), whichever comes first. (*Id.*, ¶ 23.)

The FCC also proposes to adopt, subject to further comment, a second transition period for the six months following this interim period during which, in the absence of an FCC ruling making switching, dedicated transport and / or enterprise market loops subject to unbundled access, incumbent local exchange carriers must continue to provide such access, but may do so at higher rates. (*Id.*, ¶ 29.)

Against this background, the question before the Commission is whether to adopt the UNE Appendix from the parties' current interconnection agreement as Level 3 proposes, or to adopt a new UNE Appendix that leaves out network elements that either are not required to be unbundled under the *Triennial Review Order* or as to which *USTA II* vacated the FCC's rule requiring unbundling as SBC proposes.

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[44] This decision issued too late for consideration in this arbitration under the schedule mandated by the Telecommunications Act, the Commission's Resolution ALJ-181, and the schedule stipulated to by the parties. To the extent that the Arbitrator's Report is in conflict with the FCC's order, parties may seek review under the Commission's Rules of Practice and Procedure.

SBC also offers to include a rider to the new agreement that would allow Level 3 access to the network elements referenced in the *Interim Order* until the effective date of final unbundling rules adopted by the FCC, the date that is six months after Federal Register publication of the *Interim Order* (which will be on or about March 13, 2005), or the if the *Interim Order* is withdrawn, vacated or stayed.

B. Discussion

I adopt SBC's proposed UNE Appendix and its proposed rider to apply the FCC's interim plan to this agreement. The *Interim Order* does not entitle Level 3 to the terms and conditions of its current agreement with respect to UNEs that are no longer required to be unbundled, i.e., declassified UNEs.

Level 3 asserts that the FCC's *Interim Order* requires the parties to retain the current agreement's UNE terms and conditions until the FCC adopts permanent unbundling rules or March 13, 2005, whichever is earlier. Level 3 is wrong on two counts. First, the *Interim Order* does not extend all rights and obligations regarding network elements, but only those rights and obligations related to mass market switching, enterprise market loops and dedicated transport. Second, the *Interim Order* does not apply to expired contracts, but only to contracts that continue to be in effect.

Level 3 argues that the *Interim Order* prohibits arbitration of new agreements until after the FCC adopts permanent UNE rules. Level 3 cites to the FCC's statement that:

> Moreover, if the vacated rules were still in place, competing carriers could expand their contractual rights by seeking arbitration of new contracts, or by opting into other carriers' new contracts. The interim approach adopted here, in contrast, does not enable competing carriers to do either. (*Interim Order,* ¶23.)

This statement does not stand for Level 3's proposition. To the contrary, the statement affirms that the vacated rules are no longer in place, beyond the provisions of the interim plan.

Level 3 suggests that the *Interim Order*'s provision that incumbent local exchange carriers shall continue to provide declassified UNEs "under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004" means that Level 3 is entitled to those rates, terms and conditions in its new agreement. Level 3 is incorrect. The FCC's *Interim Order* freezes in place, and protects from change of law provisions, contract terms that predate the vacated rules. The *Interim Order* does not preclude new contracts. Rather, it precludes new contracts from adopting those vacated rules. (¶ 23.)

Level 3 cites the FCC's comments that "such litigation would be wasteful in light of the Commission's plan to adopt new permanent rules as soon as possible." The FCC's discussion here, however, references litigation of change of law clauses in the event that the FCC adopted new interim requirements, which it did not. (*Id.*, ¶ 17.) It does not reference litigation over new contract terms and conditions.

In any event, Level 3's insistence on access to the declassified UNEs until the FCC adopts permanent UNE rules or March 13, 2005, whichever is earlier, is fully satisfied by SBC's proposed rider. Level 3 nevertheless objects to SBC's proposed rider as improper because SBC did not attempt to negotiate its terms, but instead presented it for the first time in the prepared testimony of its witness Silver. Level 3 argues that the proposed rider is therefore a new issue that was not raised in negotiation and therefore not subject to arbitration under Section 252.

Level 3's objection is hollow. Level 3 does not dispute that SBC and Level 3 negotiated SBC's proposed language withdrawing the declassified UNEs from the proposed interconnection agreement. SBC's concession to allow access to them on a limited basis does not constitute an injection of a new issue into the arbitration.

In addition to asserting that SBC is obliged to continue unbundled access to declassified UNEs, Level 3 contests SBC's characterization of certain UNEs as declassified. First, with respect to certain network elements, Level 3 contends that, although they are no longer ruled to be unbundled, they are nevertheless "pending" resolution and therefore subject to continuing unbundled access. Specifically, Level 3 admits that the FCC eliminated "entrance facilities" dedicated transport as a UNE in the *Triennial Review Order*, but asserts that this issue remains pending because the D.C. Circuit remanded this issue to the FCC for further explanation of its reasoning. Level 3 admits that *USTA II* vacated the FCC's finding of impairment, on a national basis, for DS1, DS3 and dark fiber dedicated transport, but asserts that this issue remains pending because the D.C. Circuit remanded the issue to the FCC to assess whether the impairment analysis should be done on a route-by-route basis.

The possibility that new rules may emerge reclassifying currently declassified UNEs does not give this Commission the discretion to require unbundled access to them. Future rules requiring unbundled access to currently declassified UNEs will be taken into account under the intervening law

provisions of this agreement. However, as Level 3 acknowledges, the law as it currently stands declassifies these network elements.[45]

With respect to DS1 and DS3 loops, Level 3 claims that *USTA II* did not vacate the rules requiring their unbundling. However, although the D.C. Circuit did not make a formal statement regarding the status of these UNEs, the FCC determined that it would assume *arguendo* that the D.C. Circuit had vacated the FCC's finding regarding enterprise market loops for the purpose of its *Interim Order*.[46] As the FCC has deemed it prudent to treat DS1 and DS3 loops as declassified pending final rules, it is likewise reasonable for this Commission to do so.

With respect to hybrid loops and fiber-to-the-home loops, Level 3 notes that *USTA II* did not vacate the *Triennial Review Order*'s ruling that placed limits on their unbundling, rather than entirely declassifying them as UNEs. Level 3 does not, however, identify any specific objections to SBC's proposed UNE Appendix with respect to whether it conforms to those limits by allowing permissible unbundled access.

Level 3 asserts that enhanced extended links (EELs) continue to be subject to unbundled access. SBC does not dispute this statement, but responds that this is irrelevant because all enhanced extended links include dedicated transport, which is declassified. This conclusion is consistent with Level 3's reference to the *Triennial Review Order*'s definition of EELs as combinations of network elements consisting of unbundled loops and unbundled transport.

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[45] See footnote 38, above.

[46] *Interim Order*, ¶ 1, fn. 4.

Level 3 points out that, although *USTA II* upheld the FCC's elimination of unbundled access to line sharing, it also upheld the FCC's rules continuing unbundled access for a three-year transition period. However, Level 3 does not propose any language from its current UNE Appendix that would provide for line sharing.

Presented with two competing UNE Appendices – SBC's, which purports to dispense with declassified UNEs, and Level 3's, which explicitly continues them – I adopt SBC's proposed UNE Appendix.

VIII. Coordinated Hot Cuts

A hot cut is the physical transfer of an end user's loop from SBC's switch to competitive local exchange carrier's switch. SBC currently performs two types of hot cuts: Frame Due Time (FDT) and Coordinated Hot Cut (CHC). The FDT option describes a hot cut that is scheduled to occur within a time frame specified by the competitive local exchange carrier, but with no active coordination, i.e., no communication, between the two carriers. The CHC generally requires similar activities, but SBC also actively coordinates with the competitive local exchange carrier during the performance of the work and does not complete the transfer until it receives the CLEC's verbal instruction to do so.

SBC represents that the cost of performing a Frame Due Time hot cut is covered by TELRIC-based rates as required for the provision of unbundled network elements. However, SBC maintains that coordination of hot cuts is an optional activity not required under the Telecommunications Act. SBC proposes charging for coordination of hot cut activity on the basis of the volume of lines, day of the week, and the time of day requested for the cut over. SBC clarifies

that the CHC charge is entirely independent and separate from the TELRIC-based charge for providing the unbundled loop.[47]

Level 3 does not dispute SBC's claim that CHC is an optional service that SBC is not required to provide under the Telecommunications Act. Nevertheless, Level 3 asserts that the Commission should adopt TELRIC-based rates for CHC service.

I adopt SBC's proposed CHC rates. SBC is not required to provide the service at TELRIC rates.

IX. Recording

SBC proposes language that would require Level 3 to provide recorded billable message detail and access usage records in accordance with MECAB standards. Level 3 proposes language that, as it describes it, would provide the parties the option of mutually agreeing to another method or format of exchange billing or usage records.

I adopt SBC's proposed language and reject Level 3's proposed language. Level 3 states that it can provide the information according to MECAB standards and offers no objection to doing so. To the extent that Level 3 wants to leave open the possibility of using a mutually agreeable alternative format, there is no need for the agreement to say so. In any event, Level 3's proposed language does not condition the alternate method or format on the parties' mutual agreement; rather, it may be read as allowing Level 3 the unilateral discretion not to provide access usage records in accordance with MECAB.

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[47] SBC witness Chapman explained, and Level 3 does not dispute, that the CHC option addressed here is offered on a per-line basis, and is distinct from the batch-cut offering at issue in the Triennial Review Order phase of R.95-04-043 / I.95-04-044.

Accordingly, I dispose of REC-1 and REC-2 by adopting SBC's proposed language for §§ 3.13 and 4.1 of the Recording Appendix, and rejecting Level 3's proposed language.

X. Signaling System 7

The Signaling System 7 (SS7) network is a data overlay network, separate from the public switched telephone network, that is used for (1) call set-up and routing, and (2) accessing call-related databases such as the 800, calling name, and calling card number query databases. SS7 quad links – the subject of this issue – are sets of data links that would connect SBC's and Level 3's SS7 networks if Level 3 were to deploy one.

SS7 is not an unbundled network element, and SBC therefore has no obligation to provide SS7 services to Level 3 under the Telecommunications Act. Nevertheless, the parties have nearly reached agreement for the sharing of costs associated with establishing SS7 quad links, and to exchange traffic through those quad links on a bill-and-keep basis. Level 3 proposes that SS7 quad links apply to interexchange carrier calls, and that parties pay each other appropriate access charges on a prorated basis. SBC maintains that SS7 quad links should be limited to calls that are subject to traditional access compensation; SBC further contends that, if Level 3 does not accept that limitation, SBC is not obligated to and will not enter into the arrangement at all.

There is no dispute that SBC is not obligated to provide SS7 service. Accordingly, the Commission does not have the authority to require SBC to provide the service under Level 3's proposed terms.

Nevertheless, I note that this dispute may be resolved at least in part by virtue of the resolution of the intercarrier compensation issues regarding IP-enabled services. SBC's stated concern focuses on attempting to segregate

what SBC characterizes as Level 3's "CLEC" calls from what SBC characterizes as Level 3's "long distance IP calls" for the purpose of assessing access charges on the latter. However, as discussed and resolved in Section III.A, IP-enabled service traffic is subject to reciprocal compensation, not access charges. Therefore there doesn't appear to be a basis for barring IP-enabled services traffic from the parties' SS7 arrangement.

XI. Out Of Exchange Traffic

SBC proposes an appendix to address the terms and conditions of Level 3's and SBC's exchange of telecommunications outside of SBC's incumbent local exchange areas, i.e., where SBC is not the incumbent carrier. In the Draft Arbitrator's Report, I declined to arbitrate SBC's proposed Out of Exchange Appendix. As SBC cautions in its discussion on transit traffic, not every disagreement between carriers who are making an interconnection agreement is subject to arbitration under Section 252. To the contrary, the Commission's authority under Section 252 is limited to interconnection agreements between CLECs and ILECs. I concluded as a factual matter that the proposed Out of Exchange Appendix, by definition, concerns Level 3's exchange of telecommunications with SBC as a CLEC, not an ILEC, and is therefore not subject to arbitration.

In its comments, SBC states that the Draft Arbitrator's Report mischaracterizes the proposed Out of Exchange Appendix as governing SBC as a CLEC, and submits that the Appendix governs SBC's obligations as an ILEC with respect to activity outside of its ILEC territory, separate and apart from its obligations under Section 251(c). While I note SBC's clarification of relationship governed by the proposed Out of Exchange Traffic Appendix, I refer again to SBC's observation in its brief that Section 252 only requires negotiation and

arbitration of the duties imposed by Sections 251(b) and 251(c). SBC concedes that the Appendix does not address its Section 251(c) duties, and neither party suggests that the Appendix addresses its Section 251(b) duties.

Although SBC addressed the merits of Level 3's proposal in its briefs, and did not raise its procedural objection at that time, it states in its comments that the Commission is procedurally barred from adopting Level 3's proposal to reject the Appendix on a wholesale basis. SBC states that, under Section 252(b)(4)(A), the Commission must limit its consideration to the issues presented by the parties in the petition and response pursuant to Sections 252(b)(1) and (3). Because neither party presented the overarching issue of whether there should be an Out of Exchange Traffic Appendix in either the petition or response, SBC submits that the Draft Arbitrator's Report improperly considered and addressed that question.

Although Level 3 proposes in its brief that the Out of Exchange Traffic Appendix should not be made a part of the parties' interconnection agreement, it did not identify this as an issue, or otherwise challenge the nondisputed terms, in its petition. Accordingly, this Final Arbitrator's Report makes no determination with respect to those portions of the Out of Exchange Traffic Appendix that were not identified as in dispute.

Most of these disputed issues either parallel the disputed issues regarding traffic that is not out of exchange or, where there is no apparent dispute over the intended treatment of out of exchange traffic, concern whether to restate in this appendix or merely reference the terms that apply to in exchange traffic. Where the suggested language is not identical to language elsewhere in the agreement, it creates uncertainty for the entirety of the agreement. I therefore resolve these issues as follows:

- OET-1: SBC's proposed § 2.1 is adopted. Level 3's objection to the language is that it may bar the out of exchange obligations from surviving the sale of an exchange to a third party. SBC's disputed language does not impact that concern, and Level 3 does not offer any language to address it.

- OET-2: Both SBC's and Level 3's proposed language in § 2.3 is rejected. SBC's proposed language presents a legal conclusion regarding what SBC is and is not obligated to do with respect to providing access to UNEs. This language is unnecessary to effect the purpose of the contract, and it is improper and unnecessary to require parties to contractually agree to a policy, factual or legal statement. Level 3's proposed alternative language that the agreement "*contains terms and conditions related to SBC-13STATE's obligations under Applicable Law*" adds nothing to the meaning or terms of the agreement.

- OET-3: SBC's proposed language in § 3.1 is rejected. SBC notes that its proposed language is identical to language already agreed to by the parties in the ITR section. The final agreement shall specifically identify and incorporate by reference the relevant terms and apply them to in-exchange traffic, without restatement, e.g., "*The provisions relating to the passing of SS7 signaling information contained in ITR Section 5.4.8 shall apply to out of exchange traffic.*" Level 3 objects to SBC's proposed language for not providing flexibility to consider alternate content and formats for the exchange of data. That objection has been considered and rejected elsewhere in this report.

- OET-4: SBC's proposed language in §§ 3.3 through 3.6 is rejected. SBC asserts that its proposed language is identical to language already agreed to by the parties in the GTC and ITR sections, except that it applies to traffic in outside of areas where SBC is the ILEC. Level 3 objects to the proposed language here as contradictory to the terms in the Performance Measurement Appendix and / or overly broad and vague. The final agreement shall specifically identify and

incorporate by reference the relevant terms and apply them to in-exchange traffic, without restatement, as described with respect to OET-3, above.

- OET-5: Both SBC's and Level 3's proposed language in § 4.1 is rejected. The disputed language in this section concerns disputed issues resolved elsewhere in this arbitration report with respect to the ITR, IC, NIM, and DEF issues. The final agreement shall specifically identify and incorporate by reference the relevant terms and apply them to in-exchange traffic, without restatement, as described with respect to OET-3, above.

- OET-6: Both SBC's and Level 3's proposed language in § 4.2 is rejected. The disputed language in this section concerns issue ITR-4, which the parties resolved by stipulation with respect to in-exchange traffic. Neither party suggests that out of exchange traffic should be treated differently. The final agreement shall specifically identify and incorporate by reference the relevant terms and apply them to in-exchange traffic, without restatement, as described with respect to OET-3, above.

- OET-7: Both SBC's and Level 3's proposed language in § 4.2 is rejected. SBC asserts that its proposed language is nearly identical to the relevant language in the ITR section, and Level 3's proposed language attempts to reference that language. The final agreement shall specifically identify and incorporate by reference the relevant terms and apply them to in-exchange traffic, without restatement, as described with respect to OET-3, above.

- OET-8: Both SBC's and Level 3's proposed language in § 4.9 is rejected. This provision addresses trunking to SBC tandems. Nothing in the provision or in the parties' discussion identifies why the trunking provision for out of exchange traffic should be treated differently than for in-exchange traffic. The final agreement shall specifically identify and

incorporate by reference the relevant terms and apply them to in-exchange traffic, without restatement, as described with respect to OET-3, above.

- OET-9: Both SBC's and Level 3's proposed language in § 5.1 is rejected. Although the parties apparently agree that the compensation provisions that apply to in-exchange traffic should apply to out of exchange traffic, this dispute concerns the definition of traffic types and their compensation that is addressed and resolved elsewhere in this report with respect to the IC issues. The final agreement shall specifically identify and incorporate by reference the relevant terms and apply them to in-exchange traffic, without restatement, as described with respect to OET-3, above.

- OET-10: This issue concerns transit traffic. Notwithstanding SBC's objection to arbitration of transit issues discussed (and rejected) elsewhere in this report with respect to the ITR and IC issues, SBC submits to arbitration of the Out of Exchange Traffic Appendix issues generally. SBC's proposed language in § 6.1 is rejected. The final agreement shall specifically identify and incorporate by reference the relevant terms and apply them to in-exchange traffic, without restatement, as described with respect to OET-3, above.

- OET-11 and OET-12:

Disputed issues OET-11 and OET-12 require a lengthier discussion. In addition to raising the debate over the definition of telecommunications traffic subject to this agreement (which is resolved elsewhere in this report), these issues concern the need to establish two-way direct final trunk groups for the exchange of traffic that originates and terminates within the same InterLATA Extended Area Service local calling area. Although it does not point to any particular citations, SBC states that the Modified Final Judgment and FCC rules prohibit such traffic from alternating route. SBC maintains that two-way direct

final trunk groups are the best way to comply with the Modified Final Judgment and FCC rules, but (through its witness) expresses its willingness to negotiate other options.

Level 3 opposes requiring direct final trunk groups as a means to prevent alternating route, as it insists that telecommunications and IP-enabled traffic does not *need* to alternate route. SBC asserts that the issue is how to ensure that traffic is in compliance with these restrictions, and points out that if Level 3 does not believe such traffic needs to alternate route, it has no reason to oppose SBC's proposed language of § 9.2 that states the parties agree that the traffic will not alternate route.

I reject SBC's proposed language in § 9.1 specifying that the two-way trunk groups be "direct final," but adopt SBC's proposed language for § 9.2 requiring the parties to agree that the associated traffic will not alternate route. This language creates the legal assurance that SBC suggests it requires in order to comply with the Modified Final Judgment and FCC rules. Accordingly, I dispose of OET-11 and OET-12 as follows:

- The language of §§ 9, 9.1, 9.3 and 9.7 identifying the traffic that is subject to this section shall conform to the resolution of this dispute elsewhere in this report, e.g., regarding Issue IC-1.

- SBC's proposed language "direct final" in § 9.1 is rejected.

- SBC's proposed § 9.2 is adopted.

XII. General Terms And Conditions

A. Assurance of Payment

1. Should Assurance of Payment Requirements be State-Specific or Interdependent?

SBC seeks to be able to require assurance of payment if Level 3 fails to establish satisfactory credit by having made 12 consecutive timely payments, or fails to timely pay an undisputed bill, in another state. SBC states that such failure by Level 3 in another state gives SBC reason to be concerned that Level 3 may not timely pay its bills in California.

Level 3 proposes that its credit-worthiness in California be based solely on its payment performance in California. Level 3 argues that its California operations should not be penalized for its inability to pay its bills in another state.

This Commission arbitrated this issue between SBC and Level 3 in 2000. Here, as in the 2000 arbitration, Level 3 fails to convincingly show that its payment history outside of California is irrelevant to its creditworthiness in California.[48] Accordingly, I resolve GT&C-1 by rejecting Level 3's proposed language in § 7.2.

2. Time for Determining Satisfactory Credit

Level 3 proposes that it be considered to have satisfactory credit if, in the last 12 consecutive months, it has received no more than two past due notices for undisputed bills. SBC opposes this, and proposes that Level 3 must have made 12 consecutive months of timely payments in order to be deemed to have satisfactory credit.

SBC's proposal would allow it to demand assurance of payment for one late payment. This is excessive. However, Level 3's proposal to preclude assurance of payment until it has failed to make timely payment three times

[48] A.00-04-037, Final Arbitrator's Report (September 5, 2000), pp. 24-25.

within the last 12 months is unduly lax. Consistent with the policy enunciated in the FCC's *Verizon Policy Statement*,[49] I adopt terms under which Level 3 shall be deemed to have satisfactory credit if it has received no more than one past due notice.[50]

SBC witness Egan points out that the Commission has previously adopted SBC's proposed language, citing to the 2000 arbitrations between Level 3 and SBC and between AT&T and SBC. Those arbitrations raised the general issue of whether past payment history is an appropriate criterion for establishing satisfactory credit, not the specific issue before us regarding what constitutes satisfactory past payment history.

SBC notes that the FCC determined that its *Verizon Policy Statement* addresses interstate access agreements and is not binding on interconnection agreements. Indeed, the FCC rejected a challenge to SBC's Section 271 application on the basis that SBC's generic interconnection agreement did not comport with the *Verizon Policy Statement* on the issue of security deposit requirements. In doing so, however, the FCC noted that SBC's security deposit requirements are not binding on any carrier absent the carrier's voluntary

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[49] *Verizon Petition for Emergency Declaratory and Other Relief,* Policy Statement, WC Docket No. 02-202, FCC 02-337 (rel. Dec. 23, 2002) (*Verizon Policy Statement).*

[50] Level 3 asserts that its proposal is consistent with the *Verizon Policy Statement.* However, Level 3's proposed language would permit two late payments without triggering the security deposit requirement, while the *Verizon Policy Statement* permits only one late payment.

agreement to them or a finding, in arbitration by a state commission, that they are just and reasonable.[51]

Accordingly, I resolve GT&C-2 as follows:

- Level 3's proposed § 7.2.1 is rejected, except that it shall reference "*no more than one valid past due notice*" instead of "*no more than two valid past due notices*."

3. What Constitutes Credit Impairment?

Level 3 proposes that the impairment of its creditworthiness must be "significant and material" in order to trigger SBC's ability to request assurance of payment. SBC opposes this language as ambiguous and dispute-provoking, proposes that impairment be determined "from information available from financial sources, including but not limited to Moody's, Standard and Poor's, and the Wall Street Journal" and including "investor warning briefs, rating downgrades, and articles discussing pending credit problems."

I agree with SBC's concern that the term "significant and material" is unduly ambiguous and subject to dispute. However, SBC's proposed language is equally so. For example, it does not protect against SBC requesting assurance of payment for negative statements by non-authoritative sources, or incorrect statements, or statements of de minimus credit impairment.

In response to my stating these concerns at hearing, SBC offered alternative language that specifically defines the circumstances that would constitute credit impairment under this section. Level 3 opposes this alternative

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[51] *Application of SBC Communications Incl., et al. for Authorization to Provide In-Region, InterLATA Services in Michigan,* WC Docket 03-138, 18 F.C.C. Rcd. 19,024 (rel. Sept. 17, 2003), at ¶182.

language, but does not articulate its objections to it. I adopt SBC's alternative language as it provides clarity and certainty as to what constitutes credit impairment.

A second dispute with respect to this issue concerns the baseline date against which Level 3's credit is to be compared. Level 3 proposes that its credit be assessed by reference to the effective date of this agreement. SBC proposes that Level 3's credit be assessed by reference to "today" or a date that is a reasonable proxy for "today."[52]

I adopt SBC's proposed reference to October 27, 2004. It is reasonable to permit SBC to request assurance of payment in the event that Level 3 suffers a credit impairment between now and the effective date of the agreement.

Accordingly, I resolve GT&C-3 by adopting the following language for GT&C § 7.2.2:

> *At any time on or after October 27, 2004, there has been a significant and material impairment of the established credit, financial health, or creditworthiness of Level 3 as compared to October 27, 2004. For purposes of this provision, a significant and material impairment is a downgrade by Standard and Poor's and/or Moody's credit rating service from Level 3's rating as of October 27, 2004.*

4. Prerequisite to Requesting Assurance of Payment

Level 3 proposes that SBC not be permitted to request assurance of payment unless SBC has complied with the agreement's terms for issuing invoices and dispute resolution. SBC appreciates Level 3's intent, but objects to this clause as overbroad because it would prohibit SBC from requesting a

[52] Although SBC originally proposed August 1, 2004, as the baseline date, it offers October 27, 2004, in its alternative language.

security deposit for Level 3's failure to pay, even if Level 3's failure to pay had nothing to do with any shortcoming in SBC's invoicing.

The undisputed language in this provision provides that Level 3 is excused from making a security deposit if the nonpayment is subject to a bona fide dispute as to which Level 3 has complied with the agreement's dispute resolution requirements. Level 3 proposes that it need only "substantially comply" with the agreement's dispute resolution requirements in order for this caveat to apply. SBC opposes qualifying Level 3's obligation to comply with the provision. I adopt SBC's position. The agreement is intended to set out the parties' obligations. Qualifying those obligations by using the term "substantial compliance" undermines the clarity and purpose of the agreement.

Accordingly, I resolve GT&C-4 as follows:

- Level 3's proposed inserts to § 7.2.3 "*for the individual State*" and "*substantially*" are rejected, as discussed at VII.A.1. Level 3's proposed language regarding SBC's compliance with invoice and dispute resolution requirements is rejected, and shall be replaced with the following phrase: "*provided that Level 3's failure to pay or dispute a bill did not result from SBC's failure to comply with the Agreement's requirements with respect to presentation of invoices and dispute resolution.*"

5. Reasonableness of Request for Assurance of Payment

Level 3 proposes that it be permitted to dispute the reasonableness of a request for assurance of payment. Level 3's language is rejected, and SBC's language is adopted. The agreement sets out the terms under which SBC may request assurance of payment. Level 3 may dispute whether SBC has complied with the terms, but the reasonableness of the terms has been taken into account in establishing the terms.

Accordingly, I resolve GT&C-5 by rejecting Level 3's disputed proposed language for GT&C §§ 7.8 through 7.8.1.

B. Billing and Payment of Charges

1. Under What Circumstances May SBC Disconnect Services for Nonpayment?

The undisputed portion of GT&C § 8.8.1 provides that failure to pay owed charges within the time specified shall be ground for termination of the services under the agreement. Level 3 proposes to add the caveat that the billing party must comply with the termination procedures, not only as specified in the agreement, but also as "otherwise set forth in applicable law." SBC objects to this phrase as ambiguous.

This issue is similar to NIM-7 discussed at Section V.B, and I resolve it accordingly. The agreement sets out the parties' current understanding and agreement as to their respective obligations, and the intervening law provisions of the contract provide that parties may take advantage of intervening law to the extent that it impacts the terms of this agreement. According, I resolve GT&C-6 by rejecting Level 3's proposed addition to GT&C § 8.8.1.

2. What Products and Services May SBC Discontinue for Level 3's Failure to Pay Undisputed Charges?

Level 3 proposes that SBC should be permitted to discontinue only those products and services for which Level 3 has failed to pay undisputed charges. SBC proposes that it be able to discontinue all products and services for failure to pay any undisputed charges.

As SBC points out, the termination provision can be invoked only upon nonpayment of undisputed charges. By definition, therefore, the failure to pay at issue would not be based on any dispute or confusion that is relevant or limited

to a particular product or service. On the other hand, however, discontinuing all services in response to nonpayment of one service can have unintended adverse consequences to innocent end-users of paid services. With this concern in mind, I resolve this issue consistent with the 2000 arbitration between AT&T and SBC where the arbitrator ordered that disconnection be limited to those services with undisputed unpaid charges.[53]

The parties also dispute whether the nonpaying party must either remit unpaid charges or, if it intends to dispute any portion of the unpaid charges, take the steps required under the agreement, within ten days (SBC's position) or 30 days (Level 3's position) of receipt of notice of unpaid charges, or face disconnection of services. Thirty days is excessive. Level 3 is already permitted 30 days to pay its bills, or to take the required steps to dispute the unpaid charges, before notice of unpaid charges is given. It is reasonable that Level 3 be required to make payment or comply with the dispute requirements within ten days after that.

Also in dispute is whether a failure to pay undisputed bills "shall" (SBC's position) or "may" (Level 3's position) be ground for disconnection. Level 3 does not specifically address this dispute. I adopt SBC's proposal. "May" is unduly ambiguous, and the use of the word "shall" does not mandate that SBC disconnect the services if it sees fit not to, only that is a ground for doing so.

Accordingly, I resolve GT&C-7 and GT&C-8 by adopting SBC's proposed language in § 9.3, and by adopting the disputed language in § 9.2 as follows:

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[53] *Application of AT&T Communications of California, Inc. for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company*, A.00-01-022, Final Arbitrator's Report, p. 398.

- Level 3's proposed term "*may*" is rejected, and SBC's proposed term "*shall*" is adopted.

- Level 3's proposed language limiting disconnection of services to the specific services for which undisputed payment has not been made is adopted.

- Level 3's proposed term "*thirty (30) Calendar*" is rejected, and SBC's proposed term "*ten (10) Business Days*" is adopted.

3. Should SBC be Permitted to Suspend Acting on New and Pending Orders on the Day the Billing Party has Sent a Second Late Payment Notice?

SBC proposes that it be entitled to suspend acting on new and pending orders on the day that it sends a second late payment notice for undisputed charges. Level 3 opposes this date because it occurs before Level 3 receives the second notice, and before the date for terminating services. I agree that SBC's right to suspend action on new and pending orders should not predate its other remedy of terminating services. I adopt SBC's proposed language, except that it shall be modified to correspond the date that it may suspend acting on new and pending orders to the date by which Level 3's late payment and / or dispute requirements are due under § 9.2.

Accordingly, I resolve GT&C-9 as follows:

- SBC's proposed § 9.5.1 is modified to read, "*If, after the time allotted under §§ 9.2 and 9.3, the non-paying party has not remitted payment and/or complied with the dispute provisions, the Billing Party may also exercise any or all of the following options:*"

- SBC's proposed §§ 9.5.1.1 through 9.7.2.2 are adopted.

- Consistent with the resolution of GT&C-7 above, Level 3's proposed language limiting suspension of services to the

specific services for which undisputed payment has not been made is adopted.

C. Intervening Law

The intervening law provision of the agreement purports to reserve the parties' rights to invoke changes of law affecting the terms and conditions of this agreement. SBC proposes to overwhelm this provision with language that, among other things, (1) attempts to recount the status of all legal proceedings that are now, or may in the future be, under further regulatory or judicial review that may affect issues in this agreement; (2) reiterates the parties' reservation of rights with respect to certain issues that are contained in other sections of the agreement; and (3) references, at length, a separate agreement by the parties that will have expired by the time this agreement takes effect. Level 3 objects to SBC's proposed additional language as "bloated" and filled with "confusing and unnecessary minutiae [that] creates uncertainty and the potential for future litigation as the parties dispute the other's interpretation."

SBC defends its proposed language as more apt to resolve a potential disagreement over what does or does not qualify as an intervening law event. To the contrary, listing pending and potential litigation does not resolve whether and which of their myriad of potential resolutions might qualify as "intervening" or changed law. Nor does it resolve disputes over what those resolutions might mean.

SBC requests that, even if the Commission rejects its proposed language for §§ 21.1, 21.2 and 21.3, it approve § 21.4 that specifies a procedure for the parties to invoke a change of law. Level 3 does not address this particular disputed language or identify its objections to it.

Accordingly, I resolve GT&C-10 as follows:

- SBC's proposed language in § 21.1 is rejected. Most of this language unnecessarily lists certain legal proceedings that may result in a change of law. The proposed language stating the parties' reservation of rights is redundant of § 21.2. The language stating the effect of invalidation, modification or stay is redundant and / or inconsistent with the procedures for invoking this provision under SBC's proposed § 21.4.

- SBC's proposed language in § 21.2 is rejected. The statement that the agreement may incorporate arbitrated provisions is unnecessarily redundant of undisputed language in § 21.1. Other language unnecessarily lists certain legal proceedings that may result in a change of law. The language regarding SBC's obligation to provide UNEs is unnecessarily redundant of the parties' general reservation of rights as well as other, separate reservation of rights applicable to UNEs contained elsewhere in the agreement.

- SBC's proposed language in § 21.3 is rejected. It unnecessarily describes the subject of a separate agreement between the parties that will have expired by the effective date of this agreement, and that in any event is adequately identified in the parties' undisputed language. The proposed language describing the status of SBC's invocation of the FCC's ISP Compensation Plan, or lack thereof, and reservation of rights with respect to that plan is unnecessarily redundant of the parties' general reservation of rights as well as other, separate reservation of rights applicable to ISP compensation contained elsewhere in the agreement.

- SBC's proposed language in § 21.4 is adopted. It describes a reasonable process for parties to invoke the intervening law provisions.

D. Assignment

SBC proposes that Level 3 not be allowed to assign or transfer this agreement to its affiliate if the affiliate already has an interconnection agreement

with SBC. SBC states that, otherwise, an affiliate could get out of its existing agreement and adopt this one without having to negotiate a replacement agreement.

SBC fails to show how transfer of this agreement to a Level 3 affiliate with a separate agreement in another state could lead to difficulties. This agreement deals with Level 3's operations in California, and confers no rights or authorities for Level 3 to operate outside the jurisdiction of the CPUC in another state. Similarly, there is no evidence that an agreement approved by another state confers rights or authorities to operate in California. The 2000 arbitration between SBC and Level 3 addressed and rejected SBC's proposed limitation on assignment,[54] and SBC offers no basis for reversing that prior resolution.

In its comments on the Draft Arbitrator's Report, SBC states that it only intends, by its proposed language, to bar assignment to a Level 3 affiliate that already has an interconnection agreement with SBC California; SBC doesn't intend to bar assignment to an affiliate that does not otherwise have an interconnection agreement with SBC California. The 2000 arbitration considered and rejected this aspect of SBC's proposed limitation on assignability as well. SBC offers no persuasive explanation of how transfer of this agreement to a Level 3 affiliate with a separate agreement with SBC California could lead to difficulties. Consistent with the 2000 arbitration, and in the absence of persuasive evidence to the contrary, I find that SBC's proposed limitation is unreasonable.

[54] Level 3 Communications, LLC Petition for Arbitration with Pacific Bell Telephone Company, A.00-04-037, Final Arbitrator's Report.

Accordingly, I resolve GT&C-11 by rejecting SBC's proposed language in § 29.1.

XIII. Definitions

A. Access Switches

The parties dispute "Access Tandem Switch" should be defined as a switching system only for interexchange traffic, or whether it should include intraLATA toll, Section 251(b)(5) and ISP-bound traffic.

Level 3 proposes a definition, taken directly from the Newton's Telecommunications Dictionary, 14th Edition, which defines "Access Tandem Switch" in the conventional sense of the term of applying to interexchange traffic. SBC proposes defining "Access Tandem Switch" as being used to also switch intraLATA toll, Section 251(b)(5) and ISP-bound traffic.

I adopt SBC's proposed language. SBC explains that, notwithstanding the common definition of "access," its California tandem switches that handle exchange traffic also handle intraLATA toll, Section 251(b)(5) and ISP-bound traffic. Accordingly, it is only accurate to adopt SBC's proposed definition.

Level 3 complains that SBC's proposed definition differs depending on the state involved, and urges the Commission to adopt a single, consistent definition as Level 3 proposes. However, SBC's language clearly distinguishes between the states where there is a broader range of traffic switched by access tandems and states where it is not. Level 3's interest in consistency between state interconnection agreements does not outweigh the Commission's interest in an accurate interconnection agreement for California.

Accordingly, I resolve DEF-1 by adopting SBC's proposed definition of "Access Tandem Switch," and rejecting Level 3's.

B. Local Switches

The parties' dispute over the definitions of tandem switches mirrors their dispute over whether Level 3 should be permitted to exchange all types of traffic over local interconnection trunks.

SBC proposes a list of definitions for tandem switches that limits the traffic that they may be used to switch as follows:

- "Local / Access Tandem Switch" would switch intraLATA, interexchange-carried, and Section 251(b)(5) traffic;
- "Local / IntraLATA Tandem Switch" would switch only Section 251(b)(5) and intraLATA traffic;
- "Local Only Tandem Switch" would switch only Section 251(b)(5) and ISP-bound traffic; and
- "Local Tandem" would refer collectively to all of these switches.

Level 3 opposes SBC's definitions to the extent that they would preclude Level 3 from exchanging all types of traffic over the local interconnection trunks and facilities. Level 3 also opposes SBC's definitions to the extent that they would limit ISP-bound traffic to switching over "Local Only Tandem Switches."

I adopt SBC's proposed definitions. Level 3's concern that SBC's definitions will preclude the exchange of IP-enabled services traffic over local interconnection trunks is addressed by defining "Section 251(b)(5) traffic" to include IP-enabled services traffic, as resolved at Section XIII.L. Likewise, I address Level 3's concern regarding the routing of ISP-bound traffic by requiring a modification to ITR § 5.3.1.1 to clarify that ISP-bound traffic may be routed over local interconnection trunks. (See discussion at Section IV.A.)

Accordingly, I resolve DEF-9, DEF-11, DEF-12 and DEF-14 by adopting SBC's proposed definitions.

C. Call Record

Level 3 proposes, and SBC opposes, a definition of "Call Record" to reflect its proposed language in Intercarrier Compensation Appendix § 4.1 excusing it from necessarily providing Calling Party Number information for IP-originating VoIP traffic. Consistent with the resolution of this issue with respect to Intercarrier Compensation Appendix § 4.1, I resolve DEF-2 by rejecting Level 3's proposed definition.

D. Circuit-Switched

Level 3 proposes to define "Circuit Switched Intra LATA Toll Traffic" to distinguish it from IP-enabled services traffic, in order to clarify that IP-enabled services traffic is not subject to access charges. SBC opposes defining this term because it contends the term should not appear in the agreement.

Although IP-enabled services traffic is currently Section 251(b)(5) traffic subject to reciprocal compensation and not access charges, that determination is made, and clarified in the arbitrated sections of the agreement, without reference to "circuit-switching." Level 3's proposed definition is therefore unnecessary, and I resolve DEF-3 by rejecting Level 3's proposed definition.

E. Declassified/Declassification

SBC proposes to define "Declassified" and "Declassification" to refer to network elements that were (or are) but are not currently (or will not be in the future) subject to unbundled access. SBC uses these terms in its Unbundled Network Elements Appendix and the rider to it, both of which I have adopted. Level 3 opposes these terms on the basis that the Commission should reject SBC's Unbundled Network Elements Appendix and adopt the UNE provisions of the parties' current interconnection agreement. Level 3 offers no other objection to SBC's proposed definitions.

I therefore resolve DEF-4 by adopting SBC's proposed definitions.

F. Demarcation Point

Level 3 and SBC agree to language that tracks 47 C.F.R. § 68.3 by defining "demarcation point" as "the point of demarcation and / or interconnection between the communications facilities of a provider of wireline telecommunications, and terminal equipment, protective apparatus or wiring at a subscriber's premises." Level 3 proposes, and SBC opposes, adding language providing that the demarcation point defines the boundary "for determining [the parties' respective] legal, technical and financial responsibilities."

I resolve DEF-5 by rejecting Level 3's proposed language. As SBC correctly points out, the definitions section is not the place to set out the parties' substantive responsibilities. Rather, its purpose is simply to define terms used elsewhere in the agreement where those substantive responsibilities are laid out.

G. Internet Service Provider

SBC proposes to define "ISP" as "an Enhanced Service Provider that provides Internet Services, and is defined in paragraph 341 of the FCC's First Report and Order in CC Docket No. 97-158." Level 3 opposes defining "ISP" by reference to this order because the FCC's definition in this order stems from the Modified Final Judgment, which is more than 20 years old. Level 3 proposes defining "ISP" as "defined consistent with the FCC in its Orders and regulations."

The FCC's mention of the 1983 Access Charge Reconsideration Order in paragraph 341 simply notes that that order determined that ISPs should not be required to pay interstate access charges. The FCC's definition of "ISPs" is found in footnote 498 to paragraph 341, and is made entirely by reference to 47 C.F.R. § 64.702(a), which defines "enhanced service," and 47 U.S.C. § 153(20),

which defines "information services;" the FCC thereupon defines "ISPs" as providers of enhanced services and information services. Level 3's contention that the FCC defined "ISP" by reference to a 20-year-old order is without merit.

Level 3's proposed definition is unreasonably vague for referring only generally to the FCC's rules and orders. Although Level 3's objection to SBC's proposed language for referencing a 20-year-old order is without merit, SBC's proposed language is also unnecessarily vague and confusing for referring to FCC language that itself refers elsewhere.

I therefore resolve DEF-7 by adopting the following language that refers directly to the basis for the FCC's definition of "ISP":

> *"Internet Service Provider" (ISP) is a provider of enhanced services, as that term is defined in 47 C.F.R § 64.702(a), or information services, as that term is defined in 47 U.S.C. § 153(20).*

H. ISP-Bound Traffic

The parties' dispute over the definitions of "ISP-Bound Traffic" mirrors their dispute over whether the FCC's *ISP Remand Order* and fixed rate of $0.0007 applies to all ISP-bound traffic, or only to traffic that is local as between the ISP and the originating end user. Specifically, SBC and Level 3 dispute whether "ISP-Bound Traffic" should be defined by reference to transmittal of the traffic over the circuit-switched network, as Level 3 proposes, or by limiting it to where the ISP and the originating end user are physically located in the same local exchange area or local calling area. Consistent with my resolution of IC-5, I resolve DEF-8 by adopting SBC's proposed definition and rejecting Level 3's.

In addition, the parties shall modify this section to delete the first, undisputed sentence that reads:

> *"ISP-Bound Traffic" means traffic that is limited to telecommunications traffic exchanged between CLEC and SBC-13STATE in accordance with the FCC's Order on Remand Report and Order, In the Matter of Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, FCC 01-131, CC Docket Nos. 96-98, 99-68 (rel. April 27, 2001) ("FCC ISP Compensation Order").*

This sentence is unduly vague in that it references an entire order without specifying particular FCC language. Its inclusion in this term also creates undue confusion by presenting two different definitions of "ISP-bound traffic": the first sentence defines "ISP-bound traffic" by reference to an FCC order, while the second sentence offers a competing, substantive definition.

In its comments on the Draft Arbitrator's Report, SBC contends that the Commission does not have the authority to reject the sentence because, according to SBC, neither Level 3 nor SBC raised any issue with respect to the sentence. To the contrary, the parties submitted the issue of how to define "ISP-bound traffic" for arbitration. The fact that neither Level 3 nor SBC opposed this particular sentence does not remove it from arbitration. In any event, SBC's statement of the issue in the joint matrix of disputed issues states, "Should the definition of "ISP-Bound Traffic" reference the FCC's ISP Compensation Order […]?" As discussed above, I resolve that issue in the negative.

I. Local Interconnection Trunk Groups

The parties' dispute over the definitions of "Local Interconnection Trunk Groups" and "Local Only Trunk Groups" mirrors their dispute over whether Level 3 should be permitted to route all traffic types over local interconnection trunks, discussed at IV.A. Specifically, SBC proposes that the agreement define "Local Interconnection Trunk Groups" as limited to carrying "Section 251(b)(5) / IntraLATA Traffic only," and that "Local Only Trunk Groups" be

defined as limited to Section 251(b)(5) traffic only. Level 3 opposes defining the term "Local Interconnection Trunk Groups" altogether, and proposes that "Local Only Trunk Groups" be defined as carrying "Telecommunications Services" traffic.

Consistent with the earlier determination that Level 3 may not route interexchange traffic over local interconnection trunks, I generally adopt SBC's position. However, SBC's proposed definitions appear to exclude IP-enabled and ISP-bound traffic from local interconnection trunks and trunk groups, contrary to the adopted terms of the Interconnection Trunking Requirements Appendix. I therefore resolve DEF-10 and DEF-13 by adopting SBC's proposed definition, except that "IP-enabled and ISP-bound traffic" shall be included in both definitions as traffic types that will be carried over local interconnection trunks and trunk groups.

J. Network Interconnection Methods

The parties' dispute over the definition of "Network Interconnection Methods" echoes their dispute over whether acceptable methods should include, not only the methods specified in the agreement, but also any method "according to Applicable Law."

As discussed with respect to NIM-7, this agreement is the place to define the parties' rights, and the intervening law provision reserves the parties' rights with respect to changes of law. Accordingly, I reject Level 3's proposed insertion to DEF-15.

K. Out of Exchange Traffic

The parties' dispute over the definition of "Out of Exchange LEC" (disputed issued DEF-16) concerns whether it should reference a potential successor-in-interest to SBC as the incumbent local exchange carrier. Level 3

requests that reference in order to ensure that the obligation under the Out of Exchange Appendix survives transfer of the exchange area to a successor. SBC opposes Level 3's proposed language on the basis that it is intended to cause the Out of Exchange obligations to somehow remain with SBC instead of passing to the successor entity. I do not read Level 3's proposed language as causing, or its explanation as intending, that result. I adopt Level 3's reference to a potential successor in interest. However, I reject Level 3's reference to Section 251(h) as unnecessarily confusing, in favor of SBC's direct reference to the incumbent local exchange area. "Out of Exchange LEC" is defined as follows:

> *"Out of Exchange LEC" (OE-LEC) means Level 3 operating within SBC-13STATE's or its successor in interest's incumbent local exchange area and providing telecommunications services utilizing NPA-NXXs identified to reside in a Third Party Incumbent LEC's local exchange area.*

The parties' dispute over the definition of "Out of Exchange Traffic" (disputed issue DEF-17) is the same as their dispute over what traffic types are subject to reciprocal compensation, as discussed with respect to disputed issues IC-2, IC-3, and ITR-5 through ITR-9. Thus SBC opposes Level 3's language to the extent that it would include IP-enabled services traffic and transit traffic.

Consistent with the resolution of these issues and the issue of the definition of "Section 251(b)(5) Traffic" (see Part XIII.L, below), "Out of Exchange Traffic" is defined as follows:

> *"Out of Exchange Traffic" is defined as Section 251(b)(5) Traffic, ISP-bound traffic, transit traffic, and InterLATA Section 251(b)(5) traffic exchanged pursuant to an FCC approved or court ordered InterLATA boundary waiver, or intraLATA traffic to or from a non-SBC ILEC exchange area.*

L. Section 251(b)(5) Traffic

SBC proposes throughout this agreement to use the term "Section 251(b)(5) traffic" for the dual purposes of (1) identifying traffic, other than ISP-bound traffic, that is subject to reciprocal compensation under Section 251(b)(5) as opposed to access charges, and (2) limiting the use of local interconnection trunks to either traffic that is subject to reciprocal compensation under Section 251(b)(5) or the FCC's *ISP Remand Order*, or interexchange traffic carried by SBC. SBC proposes to define "Section 251(b)(5) Traffic" as traffic between originating and terminating end users that are physically located in the same local exchange area or local calling area.

Level 3 states its objection to SBC's proposed definition of "Section 251(b)(5) Traffic" on the basis that it is not defined in any FCC order and will lead to future litigation. In addition, Level 3 opposes throughout this arbitration language that would subject IP-enabled services traffic to access charges, or preclude Level 3 from routing all traffic types over local interconnection trunks; SBC's proposed definition of "Section 251(b)(5) Traffic" could be interpreted to lead to that result.

I adopt SBC's approach of defining "Section 251(b)(5) Traffic" for the purpose of defining what traffic is subject to reciprocal compensation under that section, and suitable therefore for routing over interconnection trunks. This approach mirrors Section 251. Section 251(b)(5) refers to the obligation of local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of "telecommunications." As the FCC has concluded, Section 251(b)(5) is limited by Section 251(g) which "carves out" certain types of telecommunications, e.g., "exchange access, information access, and exchange services for such access to interexchange carriers and information service providers." Furthermore, as SBC notes, the FCC itself uses the term

"Section 251(b)(5) Traffic" for the same purpose of referring to telecommunications traffic that is subject to reciprocal compensation. (See, e.g., *ISP Remand Order*, ¶¶ 8, 25, 89, 98.)

However, SBC's limitations on the physical location of end users improperly exclude IP-enabled traffic from the definition of "Section 251(b)(5) Traffic." To correct for this, the definition of "Section 251(b)(5) Traffic" shall be modified as follows:

- Insert the word "*either*" after the word "*SBCSTATE*" and before the phrase "*in which the …*" in the first paragraph,

- Add the following paragraph:

Or IP-enabled services traffic where, to the extent that the traffic is routed over the Public Switched Telephone Network, such routing is entirely within the local exchange area or local calling area.

I resolve DEF-18 by adopting SBC's proposed definition as modified.

M. Switched Access Service

SBC proposes to define "Switched Access Service" by reference to its switched access tariff, which generally describes such service to be subject to interstate and intrastate switched access charges. Level 3 opposes SBC's proposed definition of "Switched Access Service" to the extent that it would improperly apply access charges to IP-enabled services traffic. Level 3 proposes instead to define "Switched Access Service" as an offering that is provided under a switched access tariff.

Although its concern is valid, Level 3's proposed language is incomplete as it is essentially tautological. I resolve DEF-19 by rejecting Level 3's proposed language, and adopting SBC's proposed language, except that the following sentence is to be added to the definition of "Switched Access Service":

Switched Access Services do not include IP-enabled services traffic.

N. FX and VNXX Traffic

This issue concerns the definition of FX, virtual NXX (VNXX), and FX-type traffic. Level 3 opposes SBC's proposed definition, and proposes its own competing definition, to the extent that SBC's definition would permit FX, VNXX, or FX-like traffic to be rated based on the geographic location of the calling parties.

As discussed at Section III.C, geography matters with respect to FX, VNXX and FX-like traffic. SBC's proposed definition appears to reasonably comport with the resolution of the substantive issues in this arbitration.

In its comments on the Draft Arbitrator's Report, Level 3 points out that its proposed language defines "virtual NXX traffic" to include and not distinguish between "virtual foreign exchange" and "FX type" traffic. Although SBC's proposed definition uses and does not distinguish between the terms "Virtual FX Traffic" and "FX-type Traffic," it does not reference the additional term "virtual NXX traffic" that Level 3 proposes. In order to clarify that all of these terms are implicated by the use of any one of them, the term "V*irtual NXX Traffic*" shall be inserted into the first sentence of SBC's proposed definition, following a comma to be inserted after the term "*Virtual Foreign Exchange (FX) Traffic.*"

Accordingly, with this modification, I resolve DEF-21 by adopting SBC's proposed definitions regarding virtual foreign exchange, FX-type, and FX telephone numbers, and rejecting Level 3's proposed definition of "Virtual NXX Traffic."

O R D E R

IT IS ORDERED that on February 15, 2005, the parties shall file and serve an entire Interconnection Agreement, for Commission approval, that conforms with the decisions of this Final Arbitrator's Report; and a statement which (a) identifies the criteria in the Act and the Commission's Rules (*e.g.*, Rule 4.3.1, Rule 2.18, and 4.2.3 of Resolution ALJ-181), by which the negotiated and arbitrated portions pass or fail those tests; (b) states whether the negotiated and arbitrated portions pass or fail those tests; and (c) states whether or not the Agreement should be approved or rejected by the Commission.

Dated February 8, 2005, at San Francisco, California.

Hallie Yacknin, Arbitrator
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Final Arbitrator's Report on all parties of record in this proceeding or their attorneys of record.

Dated February 8, 2005, at San Francisco, California.

Elizabeth Lewis

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

* *

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